> In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges .... Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. ....

► 28 U.S.C. § 46(c) provides in relevant part:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

► 28 U.S.C. § 2106 provides in full:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just in the circumstances.

► 28 U.S.C. § 1295(a)(5) provides in relevant part: "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction ... of an appeal from a final decision of the United States Court of International Trade."

Statement of the Case

This case concerns an appellate court that found precedent in a trial court decision that was before it on appeal, and so never decided the merits of the appeal. Specifically, the Court of Appeals for the Federal Circuit decided the pivotal issue in *Inn Foods* in direct reliance on *Guldman* while invested with our appeal from that trial court decision, then affirmed *Guldman* on authority of

Inn Foods while refusing to hear our arguments that *Guldman* (and, consequently, *Inn Foods*) were wrongly decided. The Federal Circuit thereby committed unprecedented precedential bootstrapping by effectively affirming *Guldman* on its own authority without reviewing it on the merits, in derogation of our appellate rights. These actions are not merely erroneous and unfair; they "so far depart[ ] from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a).

* * * * *

The substantive question involved in this case -- which we do not present for review and which the Court need not reach in order to correct the Federal Circuit's actions,[3] is: Does a consensual waiver of a statute of limitations, effective for a period of years "commencing with" its date of execution, include the execution date and thus exclude the enumerated anniversary date under the so-called "calendar method" of time computation, or exclude the execution date and thus include the enumerated anniversary date under the so-called "anniversary method" of time computation? The statute of limitations involved here is 19 U.S.C. § 1621(1), which provides that "in the case of an alleged violation of [19 U.S.C. §] 1592 ... no suit or action ... may be instituted unless commenced within 5 years after" the dates of certain specified events. During the course of administrative proceedings in § 1592 civil penalty matters, Customs [4] commonly requests the alleged violator to execute a waiver of its § 1621(1) statute of limitations

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[3] Nevertheless, we briefly discuss the substance of this case in § E below only to show that granting the relief we seek would not be an idle exercise, in that our arguments are cogent and, if considered objectively, might lead to a different outcome in this case.

[4] During the relevant period, the U.S. Customs Service, Department of the Treasury; as of March 1, 2003, the U.S. Bureau of Customs and Border Protection, Department of Homeland Security.

defense for a specified period of time (usually one or two years). Invariably, Customs drafts the waiver language, the alleged violator executes the waiver as drafted, and Customs provides written acknowledgement of the executed waiver, as happened in this case (A24-A27).

Fourteen years ago, in *United States v. Neman Bros. & Assocs.*, 777 F. Supp. 962 (Ct. Int'l Trade 1991), the Court of International Trade (the "CIT") held that the effective period of a § 1621(1) waiver "for one (1) year commencing August 1, 1988" extended through and including August 1, 1989, and so a § 1592 civil penalty recovery action filed on that date was timely. The CIT construed the waiver by applying CIT R. 6(a), analogous to Fed. R. Civ. P. 6(a) (hereinafter collectively, "Rule 6(a)"), which provides:

> In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included ....

The CIT stated that Rule 6(a)'s anniversary method "will be used in this case" because plaintiff the United States (the "Government") cited one case in which Rule 6(a) "[was] analogized to statute of limitation waivers," while the defendant cited no precedent to the contrary. *Neman*, 777 F. Supp. at 964.

Twelve years later, in *United States v. Inn Foods, Inc.*, 264 F. Supp. 2d 1333 (Ct. Int'l Trade 2003), the CIT applied contracts principles to construe a § 1621(1) waiver, and held that its effective period language "TWO YEARS, commencing on December 14, 1999" unambiguously rendered it effective through December 13, 1991, and so a § 1592 civil penalty recovery action filed on the anniversary date, December 14, 1991, was untimely. The CIT held that *Neman*, which applied Rule 6(a) to a § 1621(1) waiver, and other cases which apply Rule 6(a) to statutes of limitations, "do not address the issue of

whether Rule 6(a) ... is applicable to a waiver agreement that explicitly designates the day on which [it] would begin to toll." 276 F. Supp. 2d at 1337. The Government" appealed *Inn Foods* to the Federal Circuit.

The Government commenced the *Guldman* case in the CIT on February 5, 2003, seeking to recover from us a § 1592 civil penalty in the amount of $52,000; the CIT was vested with exclusive subject-matter jurisdiction of this action under 28 U.S.C. § 1582(1). On December 4, 2003, we moved for summary judgment in *Guldman*, in part on the ground that the last § 1621(1) waiver we executed with regard to the case was effective for a period of "one year, commencing with the date of execution" (February 5, 2002), and so the Government's action commenced on the waiver's anniversary date, February 5, 2003, was untimely. Based on standard lexicographic authorities, we demonstrated that a time period "commencing with" a date clearly indicates that the time period includes the date and so contemplates the calendar method rather than the anniversary method – no less so than the "commencing on" a date language of *Inn Foods* and in contrast to the § 1621(1) waiver language of *Neman*, which specified a "commencing" date without any attendant preposition to clarify whether the starting date is included in, or excluded from, the waiver's effective period. We also argued that *Neman* misapplied Rule 6(a) to a § 1621(1) waiver because: (a) its effective period language is drafted by Customs and accepted by the alleged § 1592 violator rather than prescribed or allowed by any court rule, court order, or statute, and therefore is beyond the specified scope of Rule 6(a); and (b) the one case that *Neman* cited as precedent for applying Rule 6(a) beyond its scope to consensual statute of limitations waivers is inapposite because it involved a statute of limitations extension period prescribed by statute, expressly within Rule 6(a)'s scope. In its response to our motion for summary judgment, the Government averred that its appeal in *Inn Foods* would authoritatively resolve

whether Rule 6(a) governs § 1621(1) waivers (hereinafter, the "Rule 6(a) issue").

The Government filed its appellant's brief in *Inn Foods* on January 1, 2004. On March 9, 2004, when Inn Foods filed its appellee's brief, we sought leave to file an amicus brief which established our interest in the *Inn Foods* appeal and addressed the Government's arguments on the Rule 6(a) issue, which Inn Foods' brief did not. 46a-54a. Among many other things, our proposed amicus brief rebutted the Government's claim that *Neman* established a long-standing CIT precedent and Customs practice to apply Rule 6(a) to all § 1621(1) waivers. The Government opposed the filing of our amicus brief, claiming that it "would [not] offer any thoughtful insight not previously presented" because it merely "echoes," rehashes" and "reiterates" Inn Foods' arguments. A single judge of the Federal Circuit rejected our amicus brief, without explanation. 55a. We requested review and reconsideration by a three-judge panel, showing how our arguments differed from Inn Foods' and emphasizing the Government's patently contradictory positions – opposing our amicus brief for duplicating Inn Foods' arguments on the Rule 6(a) issue, but later claiming in its *Inn Foods* reply brief that Inn Foods had not presented any such arguments, thereby conceding the Rule 6(a) issue to the Government by "silence" and "omission." A three-judge panel of the Federal Circuit granted review but denied reconsideration, again without explanation. 56a.

On April 28, 2004, the CIT decided *Guldman*, not merely denying our motion for summary judgment but holding that the Government's § 1592 action was timely filed. The CIT held that our § 1621(1) waiver's effective period, "one year, commencing with the date of execution," was properly computed under the anniversary method "given the waiver's ambiguity and the applicable law," and stated the "applicable law" as follows (9a- 10a):

> The court has long analogized the computation of effective dates of statute of limitations waivers with

> the computation of the limitation periods themselves, [which] are "construed to include the anniversary date of the accrual of the cause of action" under USCIT Rule 6(a). *United States v. Neman Bros. & Assocs.*, 15 CIT 536, 538, 777 F. Supp. 962, 964 (1991). .... [¶] *Neman_Brothers* has remained good law for over ten years and has informed Customs's [*sic*] polices [*sic*] and procedures with respect to § 1621(1) waivers since that time.

The CIT distinguished *Inn Foods* because, "given that waiver's explicit designation of its commencement dates, Rule 6(a) was inapplicable" (10a). Our § 1621(1) waiver, on the other hand, is ambiguous as to its effective date because "the term 'commencing with the date of execution' could mean 'commencing on' that date, or could mean, like the applicable statute of limitations, 'commencing from' or 'after' that date." 10a-11a. The CIT, however, did not then apply Rule 6(a) as the governing rule of time computation for our § 1621(1) waiver, but rather "considered the extrinsic evidence related to the parties' intent and understanding of the waiver's terms," and found that it favored the anniversary method.[5] 11a. Because the merits of the Government's § 1592 penalty claim remained undecided, we could not appeal *Guldman* immediately. We realized, however, that we had to bring our Rule 6(a) arguments to bear in the *Inn Foods* appeal (and, again, Inn Foods was not making these arguments). Therefore, we made an offer of judgment under CIT R. 68 (A132), which the Government accepted (A133). A final CIT judgment was then issued against us (A1), from

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[5] On appeal, we argued that the CIT erred by deciding the meaning of our § 1621(1) waiver based on its own inferences from disputed facts. "At the summary judgment stage, the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Federal Circuit's decision in *Inn Foods*, however, made this a moot point.

which we appealed to the Federal Circuit, as of right under 28 U.S.C. § 1295(a)(5).

Both Inn Foods and the Government relied on *Guldman* as authority supporting their positions in the *Inn Foods* appeal. See 26a-30a. Inn Foods said that *Guldman* "provides pertinent and significant support to [Inn Foods'] contention that the [CIT] was correct as a matter of law in granting summary judgment in favor of Inn Foods based on the plain and unambiguous terms of the waiver." 28a. The Government said that *Guldman* "underscores the Government's arguments on appeal that the trial court's decision in this case was an anomaly in terms of its otherwise consistent adoption of the anniversary method of computation to waivers of the statute of limitations." 30a. At oral argument in *Inn Foods*, the Government repeatedly asserted that the language of Inn Foods' § 1621(1) waiver must be interpreted not in light of its plain meaning but in light of its "practical legal effect" as found in *Guldman*, *i.e.*, that the CIT had long applied Rule 6(a)'s anniversary method to § 1621(1) waivers, and that this precedent had informed Customs' practices and policies *vis-à-vis* § 1621(1) waivers. 31a-33a. Neither the Government nor Inn Foods mentioned that *Guldman* was on appeal.

On August 23, 2004, when we filed our appellants' brief in the *Guldman* appeal, we also moved to consolidate *Guldman* with *Inn Foods* for disposition. 35a-37a. We showed that *Inn Foods* and *Guldman* present the same Rule 6(a) issue; we emphasized the Government's heavy reliance on *Guldman* at *Inn Foods*' oral argument, and asserted that "it would greatly aid the Court's decision-making process" in *Inn Foods* "to consider what the parties have to say about the [Rule 6(a) issue] in *Guldman* before deciding [that issue] in *Inn Foods* ...." 37a. Noting that the Government intended to oppose consolidation, we predicted (*id.*):

> The Government's litigation strategy here is obvious: Use *Guldman* (CIT) to win the *Inn Foods* appeal on

> the [Rule 6(a)] issue, then use *Inn Foods* (Fed. Cir.) as *stare decisis* to win the *Guldman* appeal on the same issue. In this way, the merits of our arguments on the [Rule 6(a)] issue will not matter because they will never be considered. We hope that the [Federal Circuit] will not countenance such bootstrapping.

Regrettably, it did. On September 13, 2004, a three-judge panel of the Federal Circuit decided *Inn Foods* in favor of the Government. 15a-25a. The decision's linchpin was this holding:

> For purposes of choosing the method to use in computing time, we see no reason to treat a waiver of a statute of limitations, which is effectively a consensual extension of the limitations period, any differently than the underlying statute of limitations itself. See, e.g., *United States v. Guldman*, No. 03-00047 (Ct. Int'l Trade Apr. 28, 2004) ("The court has long analogized the computation of effective dates of statute of limitations waivers with the computation of the limitation periods themselves.").

19a-20a. Since statutes of limitations are properly and consistently governed by Rule 6(a)'s anniversary method, said the panel, so are statute of limitations waivers. 20a-21a. On this basis, the panel did not look to the time period language of Inn Foods' waiver for intrinsic meaning, clarity or ambiguity, but simply held that it is not "clearly distinguishable" from the language of Rule 6(a) and so does not escape its governance. 21a-23a.

The Government's appellee's brief in *Guldman*, filed October 4, 2004, did not address the arguments presented in our appellant's brief. Rather, the Government asserted that *Guldman* "is in accordance with what is now [the] controlling precedent" of *Inn Foods*, and so must be affirmed under the panel precedent rule established by *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (1988). The Government further averred that *Guldman*'s "commencing with [a date]" § 1621(1) waiver language is

indistinguishable from the "commencing on [a date]" § 1621(1) waiver language involved in *Inn Foods*.

In our reply brief in the *Guldman* appeal, filed October 25, 2004, we agreed that *Inn Foods* "stands as controlling precedent, mandating affirmance [of *Guldman*], provided that *Inn Foods* stands," but we asked the three-judge panel assigned to *Guldman* to ask the Federal Circuit to consider hearing our appeal en banc in order to overrule *Inn Foods* as wrongly decided. *See* FED. CIR. R. 35(a)(2). Among the many errors in *Inn Foods* that we noted, we specifically complained about *Inn Foods'* reliance on *Guldman* for its central holding that Rule 6(a) governs consensual statute of limitations waivers "without any regard for, or reference to, the fact that this appeal is pending before the very same court." Nevertheless, "since *Inn Foods* does rely on *Guldman*, fairly or not," we said, "it is only fair that the [Federal Circuit] reconsider *Inn Foods* in light of the arguments we make here against *Guldman* -- most of which the *Inn Foods* panel never heard."

On October 20, 2004, a single judge of the Federal Circuit denied our motion to consolidate *Guldman* with *Inn Foods* for disposition. 38a. After Inn Foods petitioned on October 28, 2004, for panel rehearing of the adverse decision in its appeal, we moved for review and reconsideration of consolidation. 39a-44a. We also specifically requested that *Guldman* be heard by the same three-judge panel that decided *Inn Foods* for several reasons, including (43a):

> There is also a strong element of fairness here: the *Inn Foods* panel did, after all, rely on *Guldman* as supporting authority for its decision despite the fact that this appeal is pending, and it is now only fair that the same panel hear our reasons why its reliance was misplaced.

On November 9, 2004, the *Inn Foods* panel denied Inn Foods' petition for rehearing. Ten days later, the same

panel granted review and denied reconsideration of our consolidation motion. 45a.

At oral argument in *Guldman* on February 9, 2005, the assigned three-judge panel of the Federal Circuit emphasized that it is bound by *Inn Foods*, and that we must bring our arguments that *Inn Foods* is wrongly decided before the Federal Circuit en banc by means of a petition for rehearing. *See* 34a. On February 18, 2005, the panel issued a non-precedential decision affirming *Guldman* on the basis that our § 1621(1) waiver's "commencing with" language "is not clearly distinguishable from that of *Inn Foods*" and so must receive the same result, *i.e.*, construction under the anniversary method *per* Rule 6(a). The panel's decision made no mention of our arguments that *Inn Foods* is wrongly decided. 2a.

On March 30, 2005, we timely petitioned for rehearing en banc on the § 1621(1) waiver issue pursuant to FED. R. APP. P. 35 and FED. CIR. R. 35.[6] We asked the full Federal Circuit to reconsider and overrule *Inn Foods* "in light of the numerous authorities and arguments that we have presented fully in this appeal, only a few of which we can present briefly in this petition, and all of which ... the Court excluded from consideration in *Inn Foods*" and "precluded from being considered in our own appeal." Notable among these arguments was that *Inn Foods*' reliance on *Guldman* to resolve the Rule 6(a) issue "was both misplaced and unlawful." The Federal Circuit summarily denied our petition on April 25, 2005. 13a.

Argument

A. Introduction and Summary.

Any appellate court, including this Court, must "give judgment ... without regard to errors or defects which do

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[6] Because this is a civil case to which the Government is a party, our time to petition for rehearing was 45 days after entry of judgment. FED. R. APP. P. 40(a)(1).

not affect the substantial rights of the parties." 28 U.S.C. § 2111. The appellate courts normally consider this harmless-error rule after they have found error in a lower court decision, so as to then "exercise judgment in preference to ... automatic reversal." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 553 (1984). Here, however, the error and harmlessness analyses are intertwined. In order to show that the *Guldman* citation in *Inn Foods* was error, we first show that it was not "harmless" in the sense of technical or incidental; rather, that the Federal Circuit applied *Guldman* in *Inn Foods* as an authoritative precedent, with decisive effect upon the decision's framework. Then, we show that the Federal Circuit thereby "affected [our] substantial rights" by denying us the hearing and determination of the controversies in our appeal to which we are entitled by statute. Next, we show that the Federal Circuit's actions in this case are so uniquely egregious, and so antithetical to the most basic notions of fairness in our system of justice, that they deserve this Court's attention and correction. Finally, we show that the Federal Circuit's error was not "harmless" in the sense that, if we had been accorded our appellate rights, *i.e.*, if the Federal Circuit had considered our arguments against *Guldman*, it is more likely than not that it would have decided both *Inn Foods* and *Guldman* in our favor.

B. The Federal Circuit in *Inn Foods* Erroneously Applied *Guldman*, a Lower Court Decision, as Authoritative Precedent. This Error Affected Its Decisional Process.

Inn Foods' analysis began by noting *Neman*'s application of Rule 6(a) to a consensual § 1621(1) waiver, and Inn Foods' assertion (with which the CIT had agreed) that Rule 6(a) does not apply to its § 1621(1) waiver because the plain language of its effective period provision contemplated the calendar method of time computation. 17a-18a. *Inn Foods* then noted that both Inn Foods and

the Government, as well as the courts, agree that Rule 6(a) commonly governs federal statutory time limitations and applies the anniversary method to them. 19a.

At this point, *Inn Foods* determined that Rule 6(a) likewise governs and applies the anniversary method to consensual statute of limitations waivers. This was not so much a conclusion of law as a choice of policy: "For purposes of choosing the method to use in computing time, we see no reason to treat a waiver of a statute of limitations, which is effectively a consensual extension of the limitations period, any differently than the underlying statute of limitations itself." 19a. The only attendant citation is "[s]ee, e.g., *Guldman*", with quotation but without notation of its docketed appeal. 19a-20a. On its face, *Inn Foods* looked to *Guldman* as the most important precedential authority supporting its Rule 6(a) determination;[7] in actuality, it was the only authority.[8]

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[7] The introductory signal "see, e.g." in legal citation indicates that the "[c]ited authority clearly supports the proposition" and "other authorities also state the proposition, but citation to them would not be helpful or is not necessary." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION Rule 1.2 (17th ed. 2000).

[8] The "e.g." signal might suggest that *Inn Foods*' reliance on *Guldman* is insignificant because *Inn Foods* could have relied on other supporting case precedent. That is not so: *Neman* was no substitute for *Guldman* on the Rule 6(a) issue because the CIT's decision in *Inn Foods* did not follow and distinguished *Neman*; the Government thus trumpeted *Guldman* as reaffirming *Neman* and revealing the CIT's decision in *Inn Foods* as a anomaly. See 29a-33a. Otherwise, the record, briefs, and argument in *Inn Foods* do not mention any case, in any federal court, that says or even implies that a consensual statute of limitations waiver should be construed like a statute of limitations per Rule 6(a) – and our research finds none.

Inn Foods' assertion, *en passant*, that a statute of limitations waiver "is effectively a consensual extension of the limitations period" (19a) is not an independent basis for *Inn Foods*' Rule 6(a) determination; it was urged upon the *Inn Foods* panel by the Government, based upon *Guldman*. See 33a. Moreover, it is plainly wrong; statute of limitations extensions and waivers differ in both form and effect. An extension extends the statutory limitations period itself; a waiver waives the statute of limitations defense in a potential lawsuit for a different, agreed-upon time period. A waiver does not

Inn Foods' Rule 6(a) determination, based on *Guldman*, paved the way for the rest of the decision. It enabled the panel to adopt Rule 6(a) as the governing rule for consensual statute of limitations waivers, as it is for statutes of limitations (20a-21a), without considering whether Rule 6(a) applies to consensual statute of limitations waivers by its own terms (it does not; see § E below). It also enabled the panel to construe the time period language of Inn Foods' § 1621(1) waiver by a side-by-side comparison with the now-"instructive" language of Rule 6(a) to determine that the waiver does not "clearly" avoid Rule 6(a)'s governance (21a-23a), without considering the waiver language's intrinsic meaning, clarity, or ambiguity (as it should have; see § E below). Significantly, at oral argument in *Inn Foods* the Government urged the panel to do precisely what it did, to refract the plain time period language of Inn Foods' waiver through the prism of CIT precedent regarding Rule 6(a), as authoritatively found in *Guldman*. 31a-33a.

The Federal Circuit's reliance on *Guldman* for its Rule 6(a) holding in *Inn Foods* would be error even *Guldman* had not been appealed. In the courts of appeals, "the unappealed holdings of district judges have no precedential weight--that is, no significance as authority--although their persuasiveness may influence a

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extend, toll, or in any other way affect the length or running of the limitations period, as proven (at least in this case) by the fact that the § 1621(1) limitations period continued to run, and actually expired, while our § 1621(1) waivers were in effect. See *Guldman*, 8a n.3. Finally, *Inn Foods'* treating a statute of limitations waiver as "effectively" a statute of limitations extension overlooks the fact that parties can execute an extension rather than a waiver if they wish, and overlooks the law that their choice must be respected. See, e.g., *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1039 (Fed. Cir. 2003), quoting *George Hyman Constr. Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987) ("we do not have the authority" to adopt a contract interpretation that would "rewrite [a] contract, and insert words the parties never agreed to").

subsequent decision."[9] Thus, "[p]arties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded."[10] The distinction between authority and persuasiveness was explained by Chief Judge Posner of the Seventh Circuit in *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (emphasis added):[11]

> The distinction essential to understanding the [stare decisis] doctrine is between the persuasiveness and the authority of a previous decision. Any decision may have persuasive force, and invite--indeed compel--the careful and respectful attention of a court confronted with a similar case. *But unless the earlier decision is authoritative, the court that decides the later case does not discharge its judicial responsibilities adequately by merely citing the earlier decision and following it without so much as indicating agreement with it, let alone analyzing its merits.*

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[9] *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992), citing *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987). See also *City Stores Co. v. Lerner Shops of District of Columbia, Inc.*, 410 F.2d 1010, 1014 (D.C. Cir. 1969) ("Decisions of district courts ... are, of course, not binding on us and are looked to only for their persuasive effect. If they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number").

Lower court decisions may also serve to reinforce an appellate court's reading of an applicable statute and analysis of its own precedent. See, e.g., *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 161-163 (2003); *Porter v. Nussle*, 534 U.S. 516, 520 (2002); In *Inn Foods*, however, the Federal Circuit did not read Rule 6(a) and did not have any of its own precedent on point; *Guldman* was the only basis for its Rule 6(a) determination.

[10] Report of Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, May 22, 2003, at p. 32, available at http://www.uscourts.gov/rules/app0803.pdf.

[11] See also *In re Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (per curiam) (a district court decision "may be a wise, well-reasoned decision that persuades by the quality of its reasoning, but in that respect it is no different from a persuasive article or treatise. The fact of such a decision is not a reason for following it").

That is precisely what the Federal Circuit did, and failed to do, in *Inn Foods*. It determined that Rule 6(a) applies to statute of limitations waivers as well as to statutes of limitations only because the CIT in *Guldman* had expressed the same opinion; it never considered whether *Guldman*'s basis for that opinion was persuasive.

But *Guldman* had been appealed, and to the *same* court that decided *Inn Foods*. That circumstance elevates the Federal Circuit's error in relying on *Guldman* in *Inn Foods* from an inappropriate citation of non-authority to an unprecedented deprivation of basic appellate rights. We now explain how.

C. By Applying *Guldman* as Authoritative Precedent in *Inn Foods*, and then Applying *Inn Foods* as Binding Precedent to Affirm *Guldman*, The Federal Circuit Denied Us Our Statutory Right to a Hearing and Determination of the Controversies Raised in the *Guldman* Appeal.

The statutes which speak to what a court of appeals may and must do with an appeal are 28 U.S.C. § 2106, which generally empowers the court to act upon any disposition of a court that is "lawfully brought before it for review," 28 U.S.C. § 46(b), which empowers the court to "authorize the hearing and determination of cases and controversies" by panels of judges, who "shall ... hear the cases and controversies assigned as the court directs," and 28 U.S.C. § 46(c), which requires that "[c]ases and controversies shall be heard and determined" by a panel of judges unless the court orders that it be heard by the court en banc. There is no dispute that the *Guldman* appeal was properly and timely brought before the Federal Circuit as of right under 28 U.S.C. § 1295(a)(5). The Federal Circuit was then and there invested with "jurisdiction," the power[12] and the duty[13] to hear and

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[12] See, e.g., *In re NLRB*, 304 U.S. 486, 494 (1938) ("Jurisdiction as the term is to be applied in this instance, is the power to hear and determine the controversy presented, in a given set of circumstances");

determine the *Guldman* appeal, including the controversies that it presents.

Normally, an appeal is heard and determined after the parties' briefs have been filed or waived (FED. R. APP. P. 31),[14] the record on appeal, reflected in the appendix to the briefs, has been filed (FED. R. APP. P. 30),[15] and oral argument has been held (FED. R. APP. P. 34).[16] This

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Riggs v. Johnson County, 73 U.S. 166, 187 (1868) ("Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court").

[13] The federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv'n Dist. v. United States*, 424 U.S. 800, 817-18 (1976). Even if 28 U.S.C. §§ 46(b)-(c) & 2106 grant powers to the courts of appeals, not rights to litigants, cf. *Western P. R. Corp. v. Western P. R. Co.*, 345 U.S. 247, 250, 259 (1953) (so holding re 28 U.S.C. § 46(c)), the courts of appeals must exercise those powers when rightfully invoked by litigants.

[14] The appellant initially files its principal brief (FED. R. APP. P. 31(a), failing which the appellee may move to dismiss the appeal (FED. R. APP. P. 31(c); in the Federal Circuit, the clerk of the court is authorized to dismiss the case (FED. CIR. R. 31(d)). The appellee must file its principal brief after the appellant has done so (FED. R. APP. P. 31(a), failing which the appellee will not be heard at oral argument unless the court grants permission (FED. R. APP. P. 31(c)). The appellant may then file a reply brief (FED. R. APP. P. 31(a)), but may instead elect to advance its reply points at oral argument. In the Federal Circuit, if an appellant has made this election but the court does not call the case for oral argument (electing to decide the appeal on the briefs), the appellant is afforded an opportunity to file a reply brief. FED. CIR. R. 34(a).

[15] This Rule does not specify the consequences if the appellant fails to file the appendix. In the Federal Circuit, the clerk may dismiss the case in these circumstances. FED. CIR. R. 30(a)(8).

[16] An appeal may be decided on the briefs and the record without oral argument: (a) if the court of appeals "routinely" does so (*id.*); (b) if the parties "agree to submit a case for decision on the briefs," unless the court directs that the case be argued (FED. R. APP. P. 34(f); or (c) if a three-judge panel has "examined the briefs and record" and unanimously agrees that oral argument is unnecessary in the case "for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." FED. R. APP. P. 34(a)(2).

process and the Federal Rules of Appellate Procedure in general "are meant to assure a party on appeal that its argument has been comprehended and considered by the Court." *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 51 (2d Cir. 1985).

We began that process on August 23, 2004, when we filed our principal brief, showing in detail that *Guldman* was wrongly decided. The Government was to file its principal brief defending *Guldman*, and we were to file a reply brief addressing the Government's arguments. A panel of Federal Circuit judges would be assigned to the appeal, read the briefs and the record, most likely hold oral argument, and then decide the disposition of *Guldman* based on the briefs they had read and the argument they had heard.

On September 13, 2004, however, a panel of Federal Circuit judges assigned to the *Inn Foods* appeal rendered their decision in favor of the Government, reversing the CIT decision in favor of Inn Foods. The linchpin of their decision was their holding that Rule 6(a) governs both statutes of limitations and consensual statute of limitations waivers, which led to their further holding that such waivers do not escape Rule 6(a)'s governance unless they have time period language clearly different from Rule 6(a)'s. As shown in § B above, the *Inn Foods* panel reached those conclusions by not reading Rule 6(a)'s language or by interpreting the time period language of Inn Foods' waiver per se, but by citing and relying upon *Guldman* as authoritative precedent.

The *Inn Foods* panel thereby discharged the Federal Circuits' duty to hear and determine the *Inn Foods* appeal, albeit erroneously because of their unwarranted reliance on *Guldman* as precedent – but that was Inn Foods' concern. Our concern, and the gravamen of our petition to this Court, is that the *Inn Foods* panel also thereby unlawfully discharged the Federal Circuit *from* its duty to hear and determine the *Guldman* appeal.

▶ The *Inn Foods* panel did not hear and determine the *Guldman* appeal – they did not even note that the appeal existed, much less did they examine *Guldman* on the merits in light of the arguments against *Guldman* presented at that time in our principal brief. Indeed, they *refused* to do so (albeit after the fact) by denying our motion to consolidate *Guldman* with *Inn Foods* for that very purpose. See 35a-45a. Nor did the *Inn Foods* panel consider the arguments on the Rule 6(a) issue contained in the amicus brief that we sought to file before *Inn Foods* was decided, because other judges of the Federal Circuit denied us leave to file that brief. See 46a-56a.

▶ The panel of Federal Circuit judges later assigned to the *Guldman* appeal did not examine *Guldman* on the merits in light of the arguments against *Guldman* (and *Inn Foods*) presented in our principal brief, reply brief, and at oral argument.[17] Under the Federal Circuit's panel precedent rule, they were bound to affirm *Guldman* on authority of *Inn Foods*.[18] The Federal Circuit could not have affirmed *Guldman* on its own authority;[19] in effect

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[17] As used in 28 USC § 46(c), "[a] case or controversy is 'determined' when it is decided." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960). The *Guldman* panel determined nothing under 28 U.S.C. § 46(c) because it decided nothing that was controverted. They made a show of holding that the "commencing with" language of our § 1621(1) waiver "is not clearly distinguishable from that of *Inn Foods*," but we never asserted otherwise; rather, we always asserted that they have the same, time-inclusive meaning.

[18] A Federal Circuit panel is bound by prior panel decisions, which can be overturned only by the court sitting en banc. See, e.g., *Tunik v. MSPB*, 407 F.3d 1326, 1338 (Fed. Cir. 2005); *Nystrom v. Trex Co.*, 374 F.3d 1105, 1112 (Fed. Cir. 2004), quoting *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) ("This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc").

[19] The Federal Circuit generally decides questions of law de novo, without deference to the decisions of the lower courts that are under review. See, e.g., *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1351 (Fed. Cir. 2002); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed. Cir. 2000); *Medline Indus. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995). De novo, non-deferential review of

and in truth, the Federal Circuit did just that by using *Guldman* as the foundation for *Inn Foods'* authority. Even in the Federal Circuit, one cannot do indirectly what one cannot do directly.[20]

▶ The Federal Circuit then denied our petition to rehear the *Guldman* appeal en banc for the purpose of reconsidering and overruling *Inn Foods*. They thus declined to examine *Guldman* on the merits in light of our arguments against *Guldman* and *Inn Foods*.[21]

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questions of law is generally the rule in the other courts of appeals. See, e.g., *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988) ("Under the de novo standard of review, we do not defer to the lower court's ruling but freely consider the matter anew, as if no decision had been rendered below"); *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 944 (3d Cir. 1990).

[20] See, e.g., *Wright v. United States Postal Serv.*, 183 F.3d 1328, 1334 (Fed. Cir. 1999) (If testimony cannot be discredited because of a familial relationship, it cannot be discredited because of a pecuniary interest arising from that relationship -- "the [Merit Systems Protection] [B]oard should not have allowed the administrative judge to do indirectly what it expressly forbade her to do directly"); *Bank of America Nat'l Trust & Sav. Ass'n v. United States*, 23 F.3d 380, 384 (Fed. Cir. 1994) ("Although the government waived its right to challenge the board's decision awarding payment to Bianchi, it attempts to do just that by means of a third-party complaint filed in another forum. The government should not be allowed to do indirectly what it is prohibited from doing directly"); *Voge v. United States*, 844 F.2d 776, 781 (Fed. Cir.), cert. denied, 488 U.S. 941 (1988) (The United States Claims Court cannot review the merits of a military pay decision under the guise of correcting military records on procedural grounds; to allow this "would allow the Claims Court to do indirectly what it is foreclosed from doing directly").

[21] A court of appeals' denial of a petition for rehearing does not speak to the merits of the appeal in question. See, e.g., *Exxon Chem. Patents v. Lubrizol Corp.*, 137 F.3d 1475, 1479 (Fed. Cir.), cert. denied, 525 U.S. 877 (1998) ("Courts normally do not respond to petitions for rehearing and it would be a mistake to conclude that a court's non-response to an argument made in a rehearing petition necessarily means that the court has rejected that argument on the merits"); *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) ("In our view, a summary denial of rehearing en banc is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case"); *Moore v. Anderson*, 222 F.3d 280, 284 (7th Cir. 2000).

The "bottom line" here is: The Federal Circuit affirmed *Guldman* on its own authority, by way of *Inn Foods*, without ever examining *Guldman* on the merits or considering our arguments that *Guldman* was wrongly decided. We submit that the Federal Circuit thereby deprived us of our rightful appeal, by disposing of it without hearing and determining any controversy.

D. The Federal Circuit's Actions in this Case are so Uniquely Egregious, and so Antithetical to the Most Basic Notions of Fairness in our System of Justice, that They Deserve this Court's Attention and Correction.

SUP CT. R. 10(a) indicates that the Court may consider granting a petition for writ of certiorari when a court of appeals has "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power." This historical basis for certiorari does not concern the substance of a case vis-à-vis its constitutional implications, social importance, or conflicting lower court precedents; the overarching concern, rather, is for how the court of appeals went about deciding the case. This Court "is charged with supervisory functions [over] proceedings in the federal courts, [and] fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Mesarosh v United States*, 352 US 1, 14 (1956) (citations omitted). It would appear, then, that an irrational or perverse disregard of judicial rules and norms is precisely what would attract this Court's attention – and that is precisely what we have here.

The Federal Circuit disposed of our appeal in an unlawful, and patently unfair manner -- if not violative of Due Process,[22] at least unworthy of our system of justice.

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[22] There is no constitutional right to an appeal, *McKane v. Durston*, 153 U.S. 684 (1894), but because 28 U.S.C. § 1295(a)(5)

Due Process requires an opportunity to be heard at a meaningful time and in a meaningful manner. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Contrary to 28 U.S.C. §§ 46(b)-(c), the Federal Circuit denied us any opportunity to be heard at any time and in any manner, in our own appeal and in *Inn Foods* as well, which turned out to be the only place where the Federal Circuit might have given our arguments meaningful consideration.

What places the Federal Circuit's actions in this case far beyond the realm of past judicial failings, what brings this case into the realm of Rule 10(a), is the fact that it is unprecedented. We cannot find another case in which a court of appeals has committed the sort of precedential bootstrapping seen here – rendering an appellate decision squarely on the authority of a lower court decision, then turning around and affirming the lower court decision on the authority of the just-rendered appellate decision. While courts of appeals routinely find that pending appeals are controlled by their own newly-issued decisions,[23] we have found no such case where (as here) the newly-issued decision rests on the authority of the lower court decision that it stands to control on appeal – in other words, where the foundation for the newly-issued decision has been furnished by the lower court and laid without inspection, rather than constructed by the court of appeals itself. This is deference, not review.

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affords us an appeal as of right from *Guldman*, the "procedures used in deciding [our] appeal[ ] must comport with the demands of the Due Process ... Clause[ ] of the Constitution." *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

[23] See, e.g., *AT&T Corp. v. Microsoft Corp.*, 2005 U.S. App. LEXIS 14082, at 4-5 (Fed. Cir., July 13, 2005); *United States v. Scott*, 394 F.3d 111, 115 (2d Cir. 2005); *Arevalo v. Ashcroft*, 386 F.3d 19, 24 (1st Cir. 2004); *Christ Universal Mission Church v. City of Chicago*, 362 F.3d 423, 429 (7th Cir. 2004), cert. denied, 125 S. Ct. 897 (2005); *Greenbrier v. United States*, 193 F.3d 1348, 1354-55 (Fed. Cir. 1999), cert. denied, 530 U.S. 1274 (2000).

Nor do the Federal Circuit's actions here find even precedent, much less support, in the various abbreviated and condensed proceedings that the courts of appeals conduct. FED. R. APP. P. 2 permits a court of appeals "[o]n its own or a party's motion, to expedite its decision or for other good cause – [to] suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." As a seminal decision on Rule 2 explains:

> [Rule 2] recognizes the need for special handling and the parallel existence of power. The usual thing is for submission with oral argument. But when the case is judicially determined not to warrant or require that usual process the Court, consistent with a fair opportunity to the parties to advance and counter arguments and contentions, can and should prescribe the method of submission and disposition.

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, 1161 (5th Cir.), cert. denied, 394 U.S. 1012 (1969). The courts of appeal have utilized Rule 2 to develop several truncated, expedited procedures for disposing of appeals – but none of them comprehend or justify what the Federal Circuit did here.

It is common for courts of appeals to summarily affirm a lower court decision when convinced that the lower court decision is so clearly correct as a matter of law that there is no substantial controversy to be determined. See, e.g., *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994); *Chemical Engineering Corp. v. Marlo, Inc.*, 754 F.2d 331, 334-335 (Fed. Cir. 1984). *Inn Foods*, however, cannot be justified as a summary affirmance of *Guldman*, for it does not even note that *Guldman* has been appealed, much less say that it is being summarily affirmed. Moreover, even summary affirmance procedures must be "consistent with a fair opportunity to the parties to advance and counter arguments and contentions," *Groendyke*, 406 F.2d at 1161. There was no review or consideration of our *Guldman* arguments in *Inn Foods*.

It is also common for a court of appeals to affirm a lower court decision by adopting the lower court's opinion as its own -- but always after considering the arguments of the parties and expressly approving the substance of the opinion.[24] The courts of appeals thus spare themselves the effort of writing an opinion when they conclude that a lower court opinion is comprehensive and correct. The Federal Circuit in *Inn Foods* did not say that it was adopting the opinion in *Guldman* as its own. Even if it can be said to have done so implicitly, it departed completely from the adoptive affirmance practice by not stating that it was affirming *Guldman* on that basis and, most important, by not giving the slightest consideration to our arguments against *Guldman*.

Finally, we have found three decisions in the Federal Circuit which cited to lower court decisions that were pending appeal and effectively decided those appeals. They did so, however, with every regard for the pending appeals, the rights of the parties, and basic procedural fairness – all of which are not to be found in the manner in which *Inn Foods* cited *Guldman* and effectively decided the *Guldman* appeal. In all three of the cases, the Federal Circuit noted that the lower court decisions were on appeal, accepted and considered briefs from their

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[24] See, e.g., *Chrysler Motors Corp. v. United States*, 945 F.2d 1187 (Fed. Cir. 1991) ("On the opinion of the Court of International Trade, which we adopt, the decision is AFFIRMED"); *Carcamo v. Miami-Dade County*, 375 F.3d 1104, 1105 (11th Cir. 2004) ("The district court granted the County's motion to dismiss in a thorough opinion ...; we agree with the district court's analysis, and adopt its opinion ...."); *Bacon v. American Federation of State, etc., #13*, 795 F.2d 33, 34 (7th Cir. 1986) ("The union moved for summary judgment, which the district court granted in an opinion that properly disposes of the issues and that we adopt as our decision on the merits"). See also *Kroll v. United States*, 58 F.3d 1087, 1092 (6th Cir. 1995); *Perales v. Heckler*, 762 F.2d 226, 227 (2d Cir. 1985); *United States v. Neve*, 492 F.2d 465, 466 (7th Cir. 1974). The vast majority of these "adoptive" appellate dispositions are unpublished.

parties, and analyzed their reasoning.[25] In *Inn Foods*, the Federal Circuit cited *Guldman* as authority without

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[25] In *Micron Tech., Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001), the cross-appellee Micron urged affirmance of a portion of a CIT decision in its favor (*Micron Tech., Inc. v. United States*, 40 F. Supp. 2d 481, 485-86 (Ct. Int'l Trade 1999) which adopted the reasoning of a prior CIT decision, *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221 (1998). The Federal Circuit noted that *Borden* was before the court on appeal and fully considered *Borden*'s rationale (*Id.* at 1307) as well as the full set of briefs filed by the *Borden* parties (see *id.* at 1307 n.8 & 1315 n.12), but held that "the plain text of the statute and the text of the accompanying [Statement of Administrative Action]" resolve the issue in favor of the Government (*Id.* at 1314-15), and therefore "reject[ed] the holding and rationale of [*Borden*]" (Id. at 1316). Soon thereafter, the Federal Circuit officially reversed *Borden* on the controlling authority of *Micron*. *Borden, Inc. v. United States*, 2001 U.S. App. LEXIS 4170 (Fed. Cir. 2001).

In *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581 (Fed. Cir. 1994), a three-judge panel of the Federal Circuit reviewed *Conoco, Inc. v. United States Foreign Trade-Zones Bd.*, 790 F. Supp. 279 (Ct. Int'l Trade 1992), which dismissed, for lack of subject-matter jurisdiction, a challenge by foreign-trade subzone grantees to certain conditions that the Board had imposed on their grant. The CIT later dismissed, on the same grounds, a challenge to similar conditions by another grantee. *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993). Phibro Energy was permitted to file in *Conoco* an amicus brief on the merits, which noted that *Phibro* had been appealed to the Federal Circuit and that the appeal had been stayed pending decision in *Conoco* – and the Government likewise advised the panel of *Phibro*'s status on appeal. *Conoco*, 18 F.3d at 1584 n.9. The panel reversed the CIT's decision in *Conoco* and "reject[ed] the conclusion" of the CIT in *Phibro*. Id. at 1590 & n.24. Two months later, a Federal Circuit judge granted Phibro Energy's unopposed motion for summary reversal of *Phibro* in view of *Conoco*. *Phibro Energy v. Brown*, 1994 U.S. App. LEXIS 12432 (Fed. Cir. 1994).

In *American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986), the Federal Circuit reversed an interlocutory CIT order remanding a preliminary antidumping injury determination to the International Trade Commission (the "ITC"), *American Lamb Co. v. United States*, 611 F. Supp. 979 (Ct. Int'l Trade 1985), which followed CIT precedents beginning with *Republic Steel Corp. v. United States*, 591 F. Supp. 640 (Ct. Int'l Trade 1984). The Federal Circuit noted that three others CIT decisions reaching the same result on the basis of the same CIT precedent were before it on appeal, and that those appeals had been stayed pending the outcome in *American Lamb*. 785 F.2d at

noting its pending appeal, affirmatively refused to receive and consider our arguments against *Guldman*, and never questioned *Guldman*'s merits.

By every indication, what the Federal Circuit did to us in *Inn Foods* and *Guldman* is an isolated, one-time occurrence. As Justice Jackson said in *Western P. R. Corp. v. Western P. R. Co.*, 345 U.S. 247, 275 (1953) (dissenting), "[t]he case before us ... is so unique that it is without precedent and is likely to be without progeny." A dog that has not displayed vicious propensities may be entitled to "one free bite"[26]; our courts, however well they conduct their affairs, should not be entitled to one free error, especially when it would "call into serious question the integrity as well as the public reputation of judicial proceedings to permit the decision below to stand ...." *Khanh Phuong Nguyen v. United States*, 539 U.S. 69, 83 n.17 (2003). Considering how significantly the Federal Circuit's actions in *Inn Foods* and *Guldman* depart from procedural fairness and courts of appeals practice, and in light of this Court's power to oversee the courts of appeals in those regards, we respectfully request the Court to correct the Federal Circuit's errors in this case.

Finally, we believe that this case involves much more than our immediate interests: Correcting the Federal

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998 n.4. Amicus briefs on the merits were accepted from three interested parties, two of whom were participants in the stayed appeals. *Id.* at 995. The Federal Circuit discussed the CIT precedent in detail (id. at 999-1001), but held that the ITC's methodology for making the determination was permissible under the terms of the applicable statute and in light of its legislative history. The Federal Circuit concluded: "The ITC's method of proceeding in applying the statutory reasonable indication standard does not contravene but accords with clearly discernible legislative intent and is sufficiently reasonable. To the extent that Republic Steel and its progeny suggest otherwise, those decisions cannot stand." *Id.* at 1004. The three appeals were then remanded to the CIT for reconsideration in light of *American Lamb*. See, e.g., *Armstrong Rubber Co. v. United States*, 685 F. Supp. 282, 284 (Ct. Int'l Trade 1988).

[26] See, e.g., *Collier v. Zambito*, 1 N.Y.3d 444, 446, 750 N.Y.S.2d 205, 207 (2004) (common law rule).

Circuit's errors here would be of substantial and long-lasting benefit to all litigants. Our courts of appeals almost always handle their cases correctly and fairly, but in rare instances they go astray. Even Sherlock Holmes, the Great Detective, made careless mistakes, and after one such occasion he asked this favor of Dr. Watson:

> [I]f it should ever strike you that I am getting a little bit over-confident in my powers, or giving less pains to a case than it deserves, kindly whisper "Norbury" in my ear, and I shall be infinitely obliged to you.[27]

Perhaps what this Court does in *Guldman* will likewise serve to remind the courts of appeals that this Court will never tolerate their giving short-shrift to an appellant's fundamental right to a hearing and determination.

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The circumstances here presents ample justification for a summary "GVR" order, *i.e.*, grant certiorari, vacate the Federal Circuit's judgment in *Guldman* on the basis of indisputable and prejudicial error in the proceedings, and remand the case so that the Federal Circuit may properly and fairly hear and determine the case on the merits.[28] We now briefly show that this would not be an idle exercise, *i.e.*, that there is a reasonable probability that the Federal Circuit will reach a different conclusion.

E. The Federal Circuit's Error Was Not Harmless; If It Had Considered Our Arguments Against *Guldman*, It Likely Would Have Decided Both *Inn Foods* and *Guldman* in Our Favor.

The following are abbreviated versions of two of the arguments on the merits that we presented in *Guldman*,

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[27] A. Conan Doyle, *The Yellow Face*, reprinted in THE COMPLETE SHERLOCK HOLMES at 362 (C. Morely ed. 1930).

[28] Many recent GVR orders are based not on a finding of error but on changed circumstances, new developments, overlooked precedent, etc.. See generally *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam). We do not seek such a "no-fault" GVR order. See *id.* at 177-78 (Scalia, J., dissenting).

none of which (as explained above) the Federal Circuit considered in either *Inn Foods* or *Guldman*. If just these two points had been considered, we believe that *Inn Foods* and *Guldman* would have been decided very differently.

Inn Foods (19a) never considered Rule 6(a)'s express scope limitation; it governs "any period of time prescribed or allowed by [court] rules, by order of the court, or by any applicable statute." The effective period of a consensual statute of limitations waiver is none of these,[29] and so is not governed by Rule 6(a); *expressio unius et exclusio alterius*.[30] The Federal Circuit does not apply statutes beyond their prescribed scope;[31] Rule 6(a)'s boundaries are no less enforceable than those of a statute.[32]

Inn Foods finds that the time period language of Inn Foods' waiver is not "clearly distinguishable from [the

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[29] The effective period language of a § 1621(1) waiver is not set forth in any statutes, CIT orders, or CIT rules (which provide only for "failure to plead" waivers of certain defenses under CIT Rs. 8, 12(b)(1) & (h)).

[30] See, e.g., *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994); *Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir. 2004). This maxim applies "when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Rule 6(a) bespeaks the presumed intent of the courts and Congress in time periods they prescribe or allow in rules, orders and statutes. See *American Canoe Ass'n, Inc. v. City of Attalla*, 363 F.3d 1085, 1089 (11th Cir. 2004). It is a justifiable inference that Rule 6(a) was not meant to bespeak the presumed intent of private parties in time periods they define or agree to.

[31] See *Eurodif S.A. v. United States*, 2005 U.S. App. LEXIS 3567, at 28-29 (Fed. Cir. 2005); *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1251 (Fed. Cir. 2004); *Shinyei Corp. v. United States*, 355 F.3d. 1297, 1309 (Fed. Cir. 2004); *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1049 (Fed. Cir. 2001), cert. denied, 534 U.S. 1127 (2002).

[32] Being promulgated pursuant to statutory authority, 28 U.S.C. § 2633(b), CIT R. 6(a) has the same force and effect of law as if incorporated in that statute, and binds the CIT and the parties before it. See *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1183-1184 (Fed. Cir. 1993) (U.S. Court of Federal Claims rules).

language] of Rule 6(a)." Specifically, "commenc[es] on" a date and 'begins to run [from]" a date are "quite close" and "convey essentially the same message." 21a-22a. "Begin to run" and "commence" do convey the same message -- starting. Prepositions such as "from" and "on," however, are not mere verbiage; they often convey decisive meaning.[33] In this context, the prepositions "from" and "on" are clearly distinguishable and convey very different messages. A time period measured "from" a date specifies the starting date but does not indicate whether the period includes or excludes the day.[34] The preposition "on" has many dictionary definitions, but in context they point to only one reasonable reading of "a period of [time], commencing on [a day]" – the time period begins during, or at the same time as, the day.[35] The time period therefore includes the entire day as an indivisible unit.[36]

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[33] See, e.g., *Merck & Co., Inc. v. Teva Pharmaceuticals USA, Inc.*, 395 F.3d 1364, 1369-72 (Fed. Cir. 2005); *AK Steel Corp. v. Sollac*, 344 F.3d 1234, 1241 (Fed. Cir. 2003); *Perez v. MSPB*, 85 F.3d 591, 593-94 (Fed. Cir. 1996).

[34] In context, the preposition "from": "[i]ndicating a starting-point in time, or the beginning of a period. (*The date from which one reckons may be either inclusive or exclusive*)" (VI THE OXFORD ENGLISH DICTIONARY, **from** ¶ 3., at 211 (2nd ed. 1989) (emphasis added); "used as a function word to indicate a starting point: as ... something that is taken as a starting point in measuring or reckoning or in a statement of limits" (WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY, **from** ¶ 1(2), at 913 (1968).

[35] In the context of a date, occurrence or event, the word "on" is a preposition: "[i]ndicating the day of an occurrence ...." (X OXFORD, **on** ¶ 6.a., at 794); "used as a function word to indicate ... occurrence at the same time as ...." (WEBSTERS THIRD, **on** ¶ 3a(4), at 1574); meaning "at or during the time of" (WEBSTER'S NEW WORLD DICTIONARY, **on** ¶ 6, at 946 (3rd Coll. ed. 1988). See also *Inverness Med. Switz. Gmbh v. Warner Lambert Co.*, 309 F.3d 1373, 1378 (Fed. Cir. 2002) (noting the temporal meaning of "on" as "occurrence during the course of a specified day").

[36] "Fractions of a day are not generally considered in the legal computation of time, the day on which an act is done or an event occurs being wholly included or excluded." 74 AM JUR 2D, *Time* § 13; accord, 86 C.J.S. *Time* § 16. See generally *Lagandaon v. Ashcroft*, 383 F.3d 983, 990-93 (9th Cir. 2004).

Numerous statutes also speak of a time period as commencing "on" a date, clearly intending that the period includes the date.[37] There are also many case law examples.[38] (*Inn Foods* "discovered" only one of them, *FDIC v. Enventure V*, 77 F.3d 123 (5th Cir. 1996), which it disparaged on grounds that were never briefed or argued; we cited and discussed *Enventure V* in our arguments).

Thus, *Inn Foods* clearly erred in holding that a time period "commencing on" a date specifies only its starting date; the verb "commencing" alone does that. The preposition "on" additionally indicates, and clearly so, that the time period includes the date, which is the touchstone of the calendar method.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES H. BAYAR, ESQ.
Counsel for the Petitioners
44 Lynwood Road
Scarsdale, NY 10583
(914) 722-2411

July 25, 2005

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[37] See, e.g., 2 U.S.C. §§ 1, 7; 28 U.S.C. § 2 (U.S. Supreme Court "shall hold ... a term of court commencing on the first Monday in October of each year"); 41 U.S.C. § 48b(6); 18 U.S.C. § 3564(a).

[38] See, e.g., *Scanio v. United States*, 37 F.3d 858, 859 (2nd Cir. 1994); *United Van Lines, Inc. v. Anderson*, 802 F. Supp. 1399, 1400-1401 (D.S.C. 1992); *Bailey v. Faux*, 704 F. Supp. 1051, 1053 (D. Utah 1989); *Tribue v. United States*, 826 F.2d 633, 635 (7th Cir. 1987); *Ronkendorff v. Taylor*, 29 U.S. (4 Peters) 349, 361 (1830).

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-1434

UNITED STATES, Plaintiff-Appellee,

v.

LEONARD GULDMAN and L&M FIRING LINE, INC., Defendants-Appellants.

DECIDED: February 18, 2005

Before RADER, Circuit Judge, PLAGER, Senior Circuit Judge, and PROST, Circuit Judge.

RADER, Circuit Judge.

Leonard Guldman and L&M firing [*sic*] Line, Inc. (collectively, L&M) appeal the decision of the United States Court of International Trade denying their motion for summary judgment on the questions of whether service of the summons and complaint were improper, precluding that court from exercising personal jurisdiction over defendants; and if not improper, whether the statute of limitations bars the government's claims. United States v. Leonard Guldman, Inc. [*sic*], 343 F. Supp. 2d 1219 (Ct. Int'l Trade 2004) [*sic*] Because we conclude that service was proper and the complaint was filed within the period permitted by L&M's waiver of the statute of limitations, this court affirms.

Summons was served on defendants in this case by a "Special Agent Investigative Assistant" employed by United States Customs. This court agrees with the Court of International Trade that 19 U.S.C. § 1589a(2) controls this issue, and affirms its decision that service was

proper. See also United States v. Kahn, 2004 U.S. Dist. LEXIS 26636 (M.D. Fla., Nov. 29, 2004).

The additional question here is whether a waiver for a period of one year "commencing with the date of execution" and executed on February 5, 2002, was still in effect on February 5, 2003, when the Government filed its complaint in the Court of International Trade. This court treated an almost identical question in United States v. Inn Foods, Inc., 383 F.3d 1319 (Fed. Cir. 2004). Inn Foods also dealt with a waiver agreement between an importer and Customs, in that case written "for a period of two years, commencing on December 14, 1999." Id. at 1323. This court compared the waiver of Inn Foods to the wording in the Court of International Trade Rule 6(a), which regulates the procedure applicable for computing any time period prescribed or allowed by the rules. Rule 6(a) specifies a period of time that "begins to run [from]" a certain date, and also that "the day of the act, event, or default from which the designated period of time begins to run shall not be included." This court found that although the wording of the Inn Foods waiver differed from that of Rule 6(a), the message it conveyed was the same: both phrases identify a starting date, defined in the waiver as a "commencing" date and in the Rule as a "begin[ning]" date. Id. at 1324. The wording of the waiver in Inn Foods was similar enough to that of Rule 6(a) to justify application of Rule 6(a)'s calculation method, which does not include the commencement date.

The waiver in this case specified a period "commencing with the date of execution," and is not clearly distinguishable from that of Inn Foods. Therefore, the waiver in this case identifies a "commencing" date as did that in Inn Foods. The waiver in this case, "commencing with" February 5, 2002, was therefore still in effect on February 5, 2003, when Customs timely filed its complaint in the Court of International Trade.

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 03-00047

UNITED STATES, Plaintiff,

v.

LEONARD GULDMAN and L&M FIRING LINE, INC., Defendants.

[Defendant's motion for summary judgment denied.]

Dated: April 28, 2004

MEMORANDUM OPINION AND ORDER

RESTANI, Chief Judge:

Defendants move for summary judgment in this action, in which the Government seeks to enforce a civil penalty for Defendants' alleged fraudulent, grossly negligent, and negligent importation of a firearm. Defendants' motion presents two issues. First, the court must determine whether the Government's allegedly improper service of the summons and complaint precludes it from exercising personal jurisdiction over Defendants. If personal jurisdiction exists, the court must then determine whether the statute of limitations bars the Government's claims. For the reasons that follow, Defendants' motion is denied.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction over this penalty recovery action pursuant to 28 U.S.C. § 1582(1) (2000). Summary judgment to Defendants is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(d).

BACKGROUND

The material facts are not in dispute. Defendants purchased an Express Maxim firearm from S.A.B. Societa Armi Bresciane S.r.L. ("Gamba Italy") in early 1996 for $ 27,500 and a small credit from Gamba Italy.[1] First National Gun Banque, d/b/a Gamba USA, was the importer of record for the Maxim, which entered into U.S. commerce through the port of Denver, Colorado, on or about March 29, 1996, Entry No. 110-0566524-3. Gamba USA presented an invoice to the United States Customs Service ("Customs"), now known as the United States Bureau of Customs and Border Protection, that grossly understated the firearm's purchase price at $12, which in turn greatly reduced the amount of import duties and other fees collected by Customs. Customs treated the initial declaration as a clerical error and determined that the invoice should have read $ 12,000, the actual purchase price of the basic weapon. Compl. ¶ 7, Defs.' Mot. Summ. J. Ex. A. An additional invoice in the amount of $ 15,500 for extensive custom engraving of the Maxim, which was allegedly sent only to Defendants, was never supplied to Customs.[2]

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[1] It is undisputed that the firearm itself cost $12,000, and that defendants paid an additional $ 15,500 for extensive custom engraving. Plaintiff avers that the credit note taken from Gamba Italy was for $ 3000, but Defendants maintain that the note was actually for 3,000 Italian lira (approximately $690). Compl. ¶ 9, Defs.' Mot. Summ. J. Ex. A; Answer ¶ 8, Defs.' Mot. Summ. J. Ex. B. The parties' factual dispute on this point is not material to the disposition of the present motion.

[2] In its complaint, Customs alleged that Defendants knew that there were two separate invoices for the firearm, but that they failed to disclose the existence of the invoice for $ 15,500 to Gamba USA or to Customs. Compl. ¶ 10, Defs.' Mot. Summ. J. Ex. A. Defendants admitted that they received the two invoices from Gamba Italy, but disclaimed any knowledge of the documentation sent by Gamba Italy

As a result, Customs issued Defendants a Notice of Penalty or Liquidated Damages Incurred and Demand for Payment ("Penalty Notice") in the amount of $52,000 under 19 U.S.C. § 1592 on August 21, 1997. Defs.' Mot. Summ. J. Ex. F. The Penalty Notice advised that, by failing to inform the importer of record and/or Customs of the true value of the firearm, Defendants caused the actual duties, merchandise processing fees, and excise taxes not to be paid, as well as caused the correct Bureau of Alcohol, Tobacco and Firearms license not to be filed. Id. The Notice stated that "the penalty is issued at the fraud level for the domestic value of the rifle." Id.

In exchange for a mitigated penalty of $16,712.08 and an extension of time in which to pay it, Defendant Leonard Guldman, President of L&M Firing Line, executed a series of one-year waivers of the limitations period in 19 U.S.C. § 1621. Customs prepared the waivers, which Guldman had only to sign and date. The first waiver was signed on August 27, 2000, and waived the statute of limitations for one year, "commencing with the date of execution." Pl.'s Opp. to Defs.' Mot. Summ. J. Ex. 1. The Chief of the Penalties Branch, Charles D. Ressin, acknowledged the waiver "commencing on August 27, 2000 and effective through August 27, 2001," a copy of which was forwarded to Defendants approximately two months later. Id. Exs. 2 & 5. Defendants again waived the statute of limitations on April 13, 2001, "for a period of one (1) year, commencing with the date of execution." Id. Ex. 3. Chief Ressin again confirmed receipt of the waiver by letter and stated that it was "effective through April 13, 2002." Id. Ex. 4. A copy of the acknowledgment was forwarded to Defendants by letter dated May 24, 2001. Id. Ex. 6. Guldman executed the third and final waiver on February 5, 2002. Defs.' Mot. Summ. J. Ex. H. It was, in all material respects, identical to the two prior waivers Guldman had signed. Customs again sent a

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to Gamba USA, the importer of record, and the existence of a § 1592(a) violation by Defendants. Answer ¶ 10, Defs.' Mot. Summ. J. Ex. B.

letter to Guldman acknowledging that "the waiver is made for a one-year period commencing on February 5, 2002, and effective through February 5, 2003." Id. Ex. I.

Throughout this time, the parties' attempts to resolve the matter were unsuccessful. Customs then filed the summons and complaint in this action on February 5, 2003, one year and one day after Guldman executed the final one-year waiver of the statute of limitations. The complaint alleged that Defendants caused the Maxim firearm to be entered or introduced into U.S. commerce by means of entry documents containing material and false statements, acts, or omissions as to the Maxim's purchase price in violation of 19 U.S.C. § 1592. Compl. ¶¶ 5-6, Defs.' Mot. Summ. J. Ex. A. In their answer, Defendants averred, among other things, that the court lacks personal jurisdiction over them as a result of Plaintiff's improper service of process, and that the complaint was untimely filed beyond the period of limitations in 19 U.S.C. § 1621. Answer ¶¶ 32-33, Defs.' Mot. Summ. J. Ex. B. Defendants filed the instant motion for summary judgment on December 5, 2003, claiming that the action should either be dismissed without prejudice for improper service of process or dismissed as time-barred.

DISCUSSION

A. Whether the Action Should Be Dismissed Without Prejudice for Improper Service of Process

Rule 4(c)(1) of the Rules of the United States Court of International Trade ("USCIT") provides that "service of summons and complaint [**7] may be effected by any person who is not a party and who is at least 18 years of age." USCIT R. 4(c)(1) (emphasis added). Defendants argue that the summons and complaint were improperly served upon them by a Customs agent -- a representative of the Government and thus a party in this action -- in contravention of the rule. They also maintain that the

Government has no "good cause" for its failure to effectuate proper service that would justify an extension of time. See USCIT R. 4(m) (providing the court with discretion to "extend the time for service for an appropriate period" upon plaintiff's showing of "good cause").

This argument is without merit. Customs agents are specifically authorized by Congress to "execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States." 19 U.S.C. § 1589a(2) (2000). The rules of this court clearly contemplate that Government agents, such as United States marshals, may serve process. See USCIT R. 4(c)(1). Similarly, other courts have recognized that a Government employee may serve process as a representative of the Government in full compliance with the corresponding Federal Rule of Civil Procedure. See, e.g., United States v. Kahn, 2003 U.S. Dist. LEXIS 17686, No. 5:02-CV-230-OC-10GRJ, 2003 WL 22384761 (M.D. Fla. Sept. 2, 2003) (rejecting argument that the Government's complaint should be dismissed for improper service of process because defendant was personally served by an IRS officer). Accordingly, the court finds that the Customs agent who served Defendants was merely acting as a representative of the United States and was not a "party" for the purposes of USCIT Rule 4(c)(1).

B. Whether the Action Must Be Dismissed As Untimely Filed

Defendants maintain that, even if service of process was proper, this action is barred by the applicable five-year statute of limitations. See 19 U.S.C. § 1621(1) (2000) ("In the case of an alleged violation of section 1592 or 1593a of this title, no suit or action ... may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud.").

Although Defendants admit that they waived the statute of limitations "for a period of one (1) year, commencing with the date of execution" on February 5, 2002, they assert that the waiver expired by its own terms on February 4, 2003, rendering this action, filed the following day, untimely. See Defs.' Mot. Summ. J. Ex. H; Defs.' Mem. in Supp. of Mot. Summ. J. at 13. "The party asserting this defense must first establish a prima facie case that the claim is time barred ... If a prima facie case is established, the burden then shifts to the plaintiff to show that some exception to the statute of limitations existed." United States v. Thorson Chemical Corp., 16 CIT 441, 444, 795 F. Supp. 1190, 1192-93 (1992).

There is no dispute that the Government's claims are prima facie time-barred.[3] The only issue is whether the one-year waiver Defendants signed on February 5, 2002, bars the instant action, which was filed on February 5, 2003. As an initial matter, the court rejects the Government's claim that Defendants waived their statute of limitations defense by not specifically pleading it in their answer.[4] Nevertheless, as discussed infra, the court

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[3] The Penalty Notice seeking to impose penalties "at the fraud level for the domestic value of the rifle" was issued to Defendants on August 21, 1997. Accordingly, the statute of limitations on Count I of the complaint (fraud) began to run, at the latest, on that date, rendering the Government's fraud claim prima facie time-barred after August 21, 2002. Counts II and III of the complaint (gross negligence and negligence) are prima facie time-barred after March 29, 2001, five years after the alleged violations. The summons and complaint herein was filed on February 5, 2003.

[4] Defendants unequivocally asserted in their answer that "this civil action is untimely brought beyond the period of limitations set forth in 19 U.S.C. § 1621." Answ. ¶ 32, Defs.' Mot. Summ. J. Ex. B. Defendants continued that the action was time-barred because their offer of a waiver of the statute of limitations was not accepted by a Customs official invested with authority to do so. Id. In their motion for summary judgment, Defendants argue for the first time that the suit was untimely filed because the waiver, by its express terms, expired the day before the Government filed the summons and complaint. The Government asks the court to find that the affirmative

finds that Customs's [*sic*] application of the "anniversary method" in computing the waiver's expiration date[5] was appropriate given the waiver's ambiguity and the applicable law.

The court has long analogized the computation of effective dates of statute of limitations waivers with the computation of the limitation periods themselves. Statutes of limitation are "construed to include the anniversary date of the accrual of the cause of action" under USCIT Rule 6(a). United States v. Neman Bros. & Assocs., 15 CIT 536, 538, 777 F. Supp. 962, 964 (1991). Rule 6(a) provides that, "in computing any period of time prescribed or allowed by these rules, ... the day of the act, event, or default from which the designated period begins

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defense was waived because the specific legal argument relied upon in Defendants' motion was not raised in their answer.

Rule 8(d) of this court merely requires Defendants to "set forth affirmatively" their defense of statute of limitations. USCIT R. 8(d). There is no dispute that Defendants have satisfied this basic requirement. The question of whether they are then limited by the specific legal theory advanced in support of the defense in their answer is a closer one, but must also be resolved against Plaintiff. "The purpose of [USCIT Rule 8(d)] is to put opposing parties on notice of affirmative defenses and to afford them the opportunity to respond to the defenses." Daingerfield Island Protective Soc'y v. Babbitt, 309 U.S. App. D.C. 186, 40 F.3d 442, 444 (D.C. Cir. 1994). Because the statute of limitations defense was affirmatively pled in their answer, the Government was clearly put on notice that Defendants intended to assert the defense in this action. The Government also had the opportunity to—and did—respond to Defendants' specific arguments raised here in its opposition to Defendants' motion for summary judgment. As a result, the court finds that Defendants satisfied both the rule's express requirement and its underlying purpose. See id. at 445 ("While a limitations defense must 'be asserted in a responsive pleading,' it 'need not be articulated with any rigorous degree of specificity,' and is 'sufficiently raised for purposes of Rule 8 by its bare assertion.'") (citation omitted).

[5] The Government defines the "anniversary method" as follows: "Pursuant to this method, a waiver does not expire until the anniversary date of its execution has passed. For calculation purposes, the actual date of commencement is excluded from the one year period." Pl.'s Mem. in Supp. of Opp'n to Defs.' Mot. Summ. J. 3.

to run shall not be included." USCIT R. 6(a). Thus, an action filed on the anniversary date of the accrual of the cause of action would be timely filed under a statute of limitation running "from" or "after" the date of the alleged violation. See 19 U.S.C. § 1621(1) (prescribing the five-year statute of limitations applicable here). In Neman Brothers, the court found that the anniversary method was the appropriate tool for computing the effective dates for waivers of the statute of limitations "because Rule 6(a) of this Court is analogous to Fed. R. 6(a), and other precedent holds that the time computation method used in Fed. R. 6(a) applies to waivers." 15 CIT at 538, 777 F. Supp. at 964. The Neman Brothers court concluded that the waiver at issue—which was valid for "one (1) year commencing August 1, 1988 "—was valid through the anniversary date of its execution, so that the Government's action filed on that date was not barred by the statute of limitations. Id.

Neman Brothers has remained good law for over ten years and has informed Customs's [*sic*] polices and procedures with respect to § 1621(1) waivers since that time. Just last year, however, the court refused to follow Neman Brothers in light of the explicit language used in the waiver at issue, which provided that the waiver period "commenc[ed] on December 14, 1999." United States v. Inn Foods, Inc., 264 F. Supp. 2d 1333, 1338 (emphasis added), reconsideration denied by 276 F. Supp. 2d 1359 (Ct. Int'l Trade 2003), appeal docketed 04-1035 (Fed. Cir. Oct. 23, 2003). The Inn Foods court found that such unambiguous language rendered a penalty recovery action untimely when filed on the waiver's anniversary date. Id. Crucial to the court's holding was that, given that waiver's explicit designation of its commencement date, Rule 6(a) was inapplicable. Id. 264 F. Supp. 2d at 1337.

Defendants assert that Neman Brothers incorrectly analogized USCIT Rule 6(a) to the waiver in question and that the court should follow Inn Foods. The court finds,

however, that the facts of the present case distinguish it from Inn Foods and render it more like Neman Brothers, which correctly looked to Rule 6(a) to resolve the ambiguity as to the proper computation of the waiver's effective dates. As previously discussed, Defendants' February 5, 2002 waiver of the statute of limitations was effective "for a period of one (1) year, commencing with the date of execution." Defs.' Mot. Summ. J. Ex. H (emphasis added). The waiver did not explicitly state the date that it became operative or the date that it expired, rendering it quite unlike the waiver in Inn Foods. Here, the term "commencing with the date of execution" could mean "commencing on" that date, or could mean, like the applicable statute of limitations, "commencing from" or "after" that date.[6] In looking solely at the express terms of the waiver, it is impossible to ascertain whether the parties intended to abandon the established anniversary method for calculating the waiver's effective dates.

Given the waiver's ambiguity, the court has considered the extrinsic evidence related to the parties' intent and understanding of the waiver's terms. See Julius Goldman's Egg City v. United States, 697 F.2d 1051, 1058 (Fed. Cir. 1983) (stating that the parties' conduct before a controversy arises is relevant to ascertaining the parties' intent). Over the years, the Government mailed Defendants three different acknowledgment letters explicitly applying the anniversary method to compute the waivers' effective dates. Defendants never disputed Customs's [*sic*] interpretation of the waivers and continued to sign them as written and interpreted by Customs. Even more striking is that Defendants' answer, while pleading the statute of limitations defense, did not argue that the

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[6] Looking to dictionary definitions of the term "with" is not helpful, because such definitions do not shed light on the particular issue presented, where both a procedural rule and court precedent include the anniversary date of the operative event for time computation purposes.

anniversary method was inappropriate. Defendants did not challenge the anniversary method until the subsequent issuance of the Inn Foods decision, raising their argument for the first time in this motion. See supra n.4. Based on the foregoing, the court concludes that the parties' intent, as evidenced by their conduct, was to compute the waiver's effective dates by applying the established anniversary method. Accordingly, the present action was timely filed.

CONCLUSION

The waiver "commencing with the date of execution" is ambiguous, and the extrinsic evidence submitted with the briefs supports the Government's argument that the parties objectively intended to use the anniversary method to compute the effective dates of the February 5, 2002 waiver. Defendants' conduct from the time they received the first acknowledgment in 2000 until the filing of the present motion indicates that they understood the waiver in the same manner as the Government. Because the Defendants' waiver was still in effect on the date the Government filed this action, Defendants are not entitled to summary judgment on the ground that the suit was untimely filed. Accordingly, the Defendants' motion for summary judgment is DENIED.

SO ORDERED.

S/Jane A. Restani
Jane A. Restani, Chief Judge

Dated: New York, New York.
This 28th day of April, 2004.

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 2, 2005.

FOR THE COURT,
S/Jan Horbaly
Jan Horbaly
Clerk

Dated: April 25, 2005

cc: Charles H. Bayar
David S. Silverbrand

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
APR 25 2005
JAN HORBALY, CLERK

US V GULDMAN, 04-1434
(CIT – 1:03-CV-00047)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

04-1434

UNITED STATES, Plaintiff-Appellee,
v.
LEONARD GULDMAN and L&M FIRING LINE, INC., Defendants-Appellants.

JUDGMENT

ON APPEAL from the United States Court of International Trade IN CASE NO(S) 1:03-CV-00047.
This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER
OF THE COURT
S/Jan Horbaly
Jan Horbaly, Clerk

FEB 18 2005
Date

Issued as Mandate: MAY – 3 2005
COSTS:
Printing .....$ 121.76
Total .....$ 121.76

United States Court of Appeals for the Federal Circuit

04-1035

UNITED STATES, Plaintiff-Appellant,

v.

INN FOODS, INC., Defendant-Appellee.

DECIDED: September 13, 2004

Before NEWMAN, RADER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

The government appeals the decision of the Court of International Trade dismissing the government's complaint against Inn Foods, Inc., as time-barred. United States v. Inn Foods, Inc., 264 F. Supp. 2d 1333 (Ct. Int'l Trade 2003); United States v. Inn Foods, Inc., 276 F. Supp. 2d 1359 (Ct. Int'l Trade 2003) (denying motion for reconsideration). Because we conclude that the complaint was filed within the period permitted by Inn Foods' waiver of the statute of limitations, we reverse.

I

The government filed suit against Inn Foods on December 14, 2001, alleging that Inn Foods deprived the government of duties on imported produce through the use of false importation documents, in violation of 19 U.S.C. § 1592. The government alleged that, from January 22, 1987, to January 19, 1990, the price of the produce declared by Inn Foods was less than Inn Foods and its importer, Seaveg, Ltd., actually paid for the produce.

Under 19 U.S.C. § 1621, the government had five years within which to bring an action against Inn Foods. That statute provides, in pertinent part:

> [I]n the case of an alleged violation of section 1592 or 1593a of this title, no suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud . . . .

At the government's request, Inn Foods agreed to waive the statute of limitations for a two-year period commencing on December 15, 1993. Inn Foods subsequently agreed to three additional two-year extensions of the waiver of the limitations period commencing on the 14th day of December in 1995, 1997, and 1999. With respect to the final two-year period, Inn Foods executed a waiver that provided:

> Inn Foods, Inc. hereby waives the period of limitations contained in Title 19, United States Code, Section 1621 . . . for a period of TWO YEARS, commencing on December 14, 1999.

The government filed its complaint against Inn Foods in the Court of International Trade on December 14, 2001. Inn Foods moved to dismiss the complaint as time-barred, asserting that its waiver of the statute of limitations expired on December 13, 2001, one day prior to the filing date of the complaint. The government argued that the waiver expired on the anniversary of the commencement date of the waiver, pursuant to Court of International Trade Rule 6(a) and the decision in United States v. Neman Bros. & Associates, 777 F. Supp. 962 (Ct. Int'l Trade 1991). The trial court agreed with the government that if the statutory limitations period were in issue, Rule 6(a) would apply and a filing on the anniversary date of the event from which the limitations period ran would be timely. The court refused to apply Rule 6(a) to the waiver of the limitations period, however.

Instead, the court concluded that the plain meaning of the waiver document required that it be interpreted to mean that the waiver period "was to begin on December 14, 1999, and expired at 11:59 p.m. on December 13, 2001 (two years from the effective date of the waiver)."

In support of its interpretation of the waiver, the trial court concluded that Customs had a policy of counting the first day of any waiver period when computing the length of that waiver. The policy referred to by the court was stated in a Treasury Decision that provided:

> Customs has adopted a policy permitting offers by a party to "waive" the statute of limitations for a period of not less than two years. It should be noted that the two-year period ordinarily commences from the date of the waiver, unless another commencement date is specified by the waiving party.

Treas. Dec. No. 90-11, 55 Fed. Reg. 3682 (Feb. 2, 1990).

The trial court distinguished Neman and several court of appeals opinions on the ground that they did not address the question whether Rule 6(a) of the Federal Rules of Civil Procedure or the Rules of the Court of International Trade is applicable to a waiver agreement that designates the day on which the waiver period begins to be counted.

The government moved the trial court for reconsideration, seeking to introduce documents that, according to the government, showed that Inn Foods understood the waiver to extend until December 14, 2001. The trial court refused to consider those documents, because the government had failed to introduce them prior to its motion for reconsideration and had not alleged that the documents were newly discovered.

II

The government argues that the trial court should have followed the earlier decision of the Court of International Trade in United States v. Neman Bros. & Associates, 777 F. Supp. 962 (Ct. Int'l Trade 1991). In

Neman, the defendants waived the limitations period in 19 U.S.C. § 1621 for "one (1) year commencing August 1, 1988." Id. at 963. The court in Neman concluded that "[b]ecause Rule 6(a) of this Court is analogous to Fed. R. 6(a), and other precedent holds that the time computation method used in Fed. R. 6(a) applies to waivers, then the 'anniversary' method will be used in this case." Id. at 964. Applying the "anniversary" method, the Neman court concluded that "[t]he waiver period included August 1, 1989," the anniversary of the date on which the limitations period commenced. Id.

Inn Foods acknowledges that the anniversary method of calculating the limitation period set forth in Rule 6(a) would apply to the underlying statute of limitations, but argues that it should not apply to the waiver of the statute of limitations at issue in this case. According to Inn Foods, the plain meaning of the waiver language, "for a period of TWO YEARS, commencing on December 14, 1999," contemplates that in counting the two-year period, the first day, December 14, 1999, is to be counted. If the first day is counted, the two-year period would expire on December 13, 2001.

Court of International Trade Rule 6(a), on which the Neman court relied, provides:

> (a) Computation. In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. . . .

That Rule is identical to Federal Rule of Civil Procedure 6(a) in all relevant respects.

Both rules identify two separate points in time—the day of the event that triggers the running of a time period, and the day on which the time period begins to be counted. The rules provide that the time period begins to be counted on the day following the day of the event that triggers the beginning of the time period. Applying that counting method to this case would require us to conclude

that the waiver began on December 14, 1999, but the counting of the two years did not begin until December 15, 1999. The final day of the waiver would then be December 14, 2001, the anniversary of the beginning of the waiver.

The parties agree that if the issue in this case were the method to be used for counting a statutory limitations period, Rule 6(a) would govern and the anniversary method of counting would be applied. Other courts concur, and the counting method of Federal Rule 6(a) has been applied in a variety of statutory contexts. For example, in Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001), quoting Union Nat'l Bank v. Lamb, 337 U.S. 38, 41 (1949), the court wrote: "Rule 6(a) is widely applied to federal limitations periods. The Supreme Court has held that because Rule 6(a) had the concurrence of Congress, it can apply to 'any applicable statute' in the absence of contrary policy expressed in the statute." See also Am. Canoe Ass'n, Inc. v. City of Attalla, 363 F.3d 1085, 1086 (11th Cir. 2004) ("This circuit has long recognized as a general policy a legislative intent to apply Rule 6(a) to all federal statutes enacted or amended after the adoption of Rule 6(a). That policy generally prevails unless the statute in question itself reflects a contrary intent."); Bronaugh v. Ohio, 235 F.3d 280, 284 (6th Cir. 2000); Lawson v. Conyers Chrysler, Plymouth, and Dodge Trucks, Inc., 600 F.2d 465, 466 (5th Cir. 1979) ("This court has consistently used Rule 6(a)'s method for computing federal statutory time limitations."). See generally 4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1163 (2d ed. 1987).

For purposes of choosing the method to use in computing time, we see no reason to treat a waiver of a statute of limitations, which is effectively a consensual extension of the limitations period, any differently than the underlying statute of limitations itself. See, e.g., United States v. Guldman, No. 03-00047 (Ct. Int'l Trade Apr. 28, 2004) ("The court has long analogized the

computation of effective dates of statute of limitations waivers with the computation of the limitation periods themselves.").

Statutes of limitations (and waivers thereof) use a variety of verbal formulas to describe the starting date for the limitations period, such as "beginning on," "within one year from," "after," "within two years after," or "from" a specified date. In each of those instances, as in the case before us, the starting date of the limitations period is clearly specified. However, it is often the case, and it is the case here, that the expiration date of the limitations period is not explicitly provided. Thus, "[t]he harder question is when the [limitations period] ends." United States v. Marcello, 212 F.3d 1005, 1008 (7th Cir. 2000).

Technically, if a two-year period commences as of an event that occurs at, for example, 3 p.m. on January 1, 2003, the two-year period will end at 2:59 p.m. on January 1, 2005. For that reason, using the "calendar method" of counting that Inn Foods advocates, which would count the day on which the limitations period commences, and would have the limitations period end on December 31, 2004, would result in a period of less than two years. The "calendar method" therefore does not provide an inherently more accurate gauge of the two-year period than the "anniversary method," even if the counting of the limitations period is considered to start at the time of the "beginning" or "commencement" of that period. The obvious practical advantage of either counting method over the more precise method is to avoid the need to inquire as to the exact time of day that the triggering event occurred, something that would often be difficult to ascertain.

As the Seventh Circuit has explained, "[b]oth the calendar-year and the anniversary method are reasonable—what matters is establishing an unequivocal rule that lets litigants know where they stand and spares judges from becoming enmeshed in such nitpicking in the future." Marcello, 212 F.3d at 1009-10. Rule 6(a)

provides a means to avoid the confusion that arises in distinguishing between the event that triggers the beginning of a time period and the day on which the counting begins. "Because courts do not have stopwatches in hand when deadlines draw near, and because the anniversary date is clear and predictable and therefore easier for litigants to remember, for lawyers to put in their tickler files, and for courts to administer," the anniversary rule of Rule 6(a) is a sensible default rule. Marcello, 212 F.3d at 1010; accord Patterson, 251 F.3d at 1246 ("We are satisfied that Rule 6(a) provides a reasonable basis for determining the appropriate ending of the grace period. . . . [T]he 'anniversary method' of Rule 6(a) has the advantage of being easier for petitioners, their attorneys and the courts to remember and apply.").

Inn Foods does not take issue with any of those propositions, but argues that when the plain terms of a waiver depart from the method of computation dictated by Rule 6(a), there should be no presumption that the Rule's computation method applies. We agree, of course, that a waiver of the statute of limitations, like the statute of limitations itself, can be drafted to require a different method of computation than that specified in Rule 6(a). See Am. Canoe Ass'n, 363 F.3d at 1086 ("This policy [of applying Federal Rule 6(a)] generally prevails unless the statute in question itself reflects a contrary intent."). The question in this case is thus whether the Inn Foods waiver expressed an intention to use a computation method different from that set forth in Rule 6(a).

The waiver in question here waived the limitations period "for a period of two years, commencing on December 14, 1999." The language of Rule 6(a) is instructive in construing the language of the waiver. Rule 6(a) provides that "the day of the act, event, or default from which the designated period of time begins to run shall not be included." Although the wording of the Inn Foods waiver differs from that of Rule 6(a), the

message it conveys is essentially the same. The Inn Foods waiver specifies a period that "commenc[es] on" a certain date, while Rule 6(a) specifies a period of time that "begins to run [from]" a certain date. Both phrases identify a starting date, the waiver identifying a "commencing" date and the Rule identifying a "begin[ning]" date. Because Rule 6(a) sets forth the default rule for computing the ending date of a limitations period, a limitations statute or waiver must have language that is clearly distinguishable from that of Rule 6(a) if it is to be construed to require a different counting method. In this case, the language of the waiver is quite close to that of the Rule and therefore is governed by the counting method dictated by the Rule.

Other courts of appeals have reached a similar conclusion with respect to limitations language similar to the language at issue in this case. Thus, for example, courts that have addressed the applicability of Federal Rule 6(a) to the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that the "limitation period shall run from" a certain date, have uniformly adopted the anniversary method of computation. See Mickens v. United States, 148 F.3d 145, 148 (2d Cir. 1998); Hernandez v. Caldwell, 225 F.3d 435, 439 (4th Cir. 2000); Flanagan v. Johnson, 154 F.3d 196, 202 (5th Cir. 1998); Bronaugh v. Ohio, 235 F.3d 280, 284 (6th Cir. 2000); United States v. Marcello, 212 F.3d 1005, 1009-10 (7th Cir. 2000); Moore v. United States, 173 F.3d 1131, 1135 (8th Cir. 1999); Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). The Patterson court explained that "AEDPA does not provide an alternative method for computing time periods, and Congress has not otherwise expressed an intent to preclude the application of Rule 6(a)." 251 F.3d at 1246.

The AEDPA cases provide strong support for the government's argument that the waiver in this case should be construed in accordance with the anniversary method of Rule 6(a). The words "run[ning] from" and the

words "commencing on" seem quite similar for purposes of determining how they should be construed for counting purposes. Both expressions denote the day on which the limitations period begins, but neither specifically identifies the day on which to start counting the limitations period or the day on which the limitations period ends. Yet because the limitations statute in the AEDPA, like the language in the waiver in this case, is silent as to the day on which to start counting the limitations period, the courts have looked to the computation method of Rule 6(a). We think the same approach is appropriate here.

The only contrary authority we have discovered is the Fifth Circuit's decision in Federal Deposit Insurance Corp. v. Enventure V, 77 F.3d 123, 125-26 (5th Cir. 1996). In that case, the Fifth Circuit held that a statute that referred to the limitations period as "beginning on [a certain] date" reflected an intention to apply a counting method different from that of Federal Rule 6(a). The Enventure V court explained that:

> The phrase "within one year" is vague as to when the limitations period is to begin and end and thus the court properly applied Rule 6(a) in determining the calculation of the limitations period. Such is not the case with the phrase "beginning on the date" which provides a specific reference to the beginning of the limitations period.

Id. at 125. The court concluded that "[t]he use of the word 'on' is clear and creates a more specific rule which overrides the application of Rule 6(a)." Id. at 126. With respect, however, we believe the Enventure V decision misses the point. It is true that the language "beginning on" a certain date provides a specific reference to the beginning of the limitations period. But it does not state the ending date of the limitations period. Nor does it imply that the counting of the limitations period would be done differently than is specified in Rule 6(a), in which the starting date of the limitations period is not counted.

The distinction between the starting date of the limitations period and the first day counted is illustrated by Sain v. City of Bend, 309 F.3d 1134, 1136-37 (9th Cir. 2002), in which the court held that "Rule 3 of the Federal Rules of Civil Procedure ['A civil action is commenced by filing a complaint with the court'] tells us when the action 'commences' for purposes of the statute of limitations, and . . . Rule 6(a) tells us how to compute the time for purposes of Rule 3." The Sain court explained: "Because Rule 3 tells us when this action commences, Rule 6(a) applies, telling us how to compute 'any period of time prescribed or allowed by these rules.'" Id. at 1138.

The decision in Enventure V appears to be an anomaly. Moreover, it has been questioned by a later panel of the Fifth Circuit, which pointed out that Enventure V appears to be inconsistent with an earlier decision of the same circuit. See Flanagan v. Johnson, 154 F.3d 196, 202 n.4 (5th Cir. 1998) ("We note that Enventure V appears to be the only published case in our Circuit rejecting application of Rule 6(a) to a federal statutory limitation period. Moreover, the Court's holding in Enventure V, that Rule 6(a) does not apply to the limitation provision in § 1821(d) of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), is in at least potential conflict with the Court's implicit application of Rule 6(a) to the same provision in FDIC v. Bledsoe, 989 F.2d 805, 811-12 (5th Cir. 1993)."). In Bledsoe, the Fifth Circuit concluded that "[a]s the six year period began running on December 19, 1985, the FDIC's claim filed on December 18, 1991, was filed one day before the expiration of the limitations period, and thus was timely filed." 989 F.2d at 809. We therefore do not regard Enventure V as persuasive authority supporting the result reached by the trial court in this case.

The trial court relied heavily on the Customs Service policy set forth in Treasury Decision No. 90-11, 55 Fed. Reg. 3682 (Feb. 2, 1990), which provides that "the two-

year period ordinarily commences from the date of the waiver, unless another commencement date is specified by the waiving party." The trial court's reliance is misplaced, however. The Customs policy states Customs' position as to the beginning date of a waiver. But it says nothing about Customs' position regarding the date on which counting should begin, nor does it suggest that the starting date for counting the limitations period should differ from the general rule set forth in Rule 6(a). Thus, the policy provides no support for selecting the counting method chosen by the trial court in this case.

In sum, statutes of limitations and waivers often identify the date on which a time period starts, but not the date on which the period ends. To avoid the confusion of choosing between two reasonable approaches for calculating the end date of the period—the anniversary method or the calendar-year method—courts have chosen to follow the guidance of Rule 6(a) absent clear language to the contrary in the statute or waiver in question. We adopt that approach. In the absence of evidence that the parties intended otherwise, a waiver of the statute of limitations that specifies only the starting date of the designated period should be construed to adopt the calculation method of Rule 6(a). Under that approach, the Inn Foods waiver expired on December 14, 2001.

REVERSED AND REMANDED.

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June 1, 2004

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

RE: **Citation of Supplemental Authority**
UNITED STATES v. INN FOODS, INC.
Appeal No. 04-1035

Dear Sir or Madam:

In the matter currently before the United States Court of Appeals for the Federal Circuit, United States, *Plaintiff-Appellant* v. Inn Foods, Inc., *Defendant-Appellee*, Appeal No. 04-1035, the Appellee Inn Foods, Inc. seeks to bring pertinent and significant authorities to this Court's attention in accordance with the provisions of Rule 28(j) of

the Federal Rules of Appellate Procedure, Fed. R. App. P. 28(j), which provides as follows:

> Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed - or after oral argument but before decision - a party may promptly advise the circuit court by letter, with a copy to all other parties, setting for the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

The Government's principal argument on appeal is that the trial court erred in failing to apply the "anniversary method," adopted in United States v. Neman Bros., 777 F. Supp. 962 (C.I.T. 1991), in computing the expiration date of Inn Foods' waiver. See BRIEF FOR PLAINTIFF-APPELLANT, STATEMENT OF THE ISSUES, p. 1. The parties had already filed their briefs in this matter when the Court of International Trade reached its decision in United States v. Leonard Guldman et al., Slip Op. 04-43, decided April 28, 2004, clarifying its earlier decision in the trial court judgment which is the subject of this appeal.

In Leonard Guldman, Chief Judge Jane A. Restani contrasted the Neman Brothers waiver to that executed by the parties in Inn Foods, concluding that the Inn Foods court correctly distinguished the two, as she explains:

> The Neman Brothers court concluded that the waiver at issue—which was valid for "one (1) year commencing August 1, 1988 "—was valid through the anniversary date of its execution, so that the Government's action filed on that date was not barred by the statute of limitations. Id. Just last year, however, the court refused to follow Neman Brothers in light of the explicit language used in the waiver at issue, which provided that the waiver period

"commenc[ed] on December 14, 1999." United States v. Inn Foods, Inc., 264 F. Supp. 2d 1333, 1338 (emphasis added), reconsideration denied by 276 F. Supp. 2d 1359 (Ct. Int'l Trade 2003), appeal docketed 04-1035 (Fed. Cir. Oct. 23, 2003). The Inn Foods court found that such unambiguous language rendered a penalty recovery action untimely when filed on the waiver's anniversary date. Id. Crucial to the court's holding was that, given that waiver's explicit designation of its commencement date, Rule 6(a) was inapplicable. Id. 264 F. Supp. 2d at 1337. Leonard Guldman at 8-9.

The recent decision in Leonard Guldman provides pertinent and significant support to Defendant-Appellee's contention that the trial court was correct as a matter of law in granting summary judgment in favor of Inn Foods based on the plain and unambiguous terms of the waiver. A copy of the Leonard Guldman decision is included herewith for the convenience of the Court.

Respectfully submitted
HORTON, WHITELY & COOPER

By: S/Craig A. Mitchell
Craig A. Mitchell, Attorney at Law

Cc: MICHAEL S. DUFAULT (by certified mail)
Trial Attorney, Commercial Litigation Branch
Civil Division, U.S. Department of Justice
1100 L Street, N.W., Washington, D.C. 20530

Encl: United States v. Leonard Guldman, Slip Op. 04-43 (C.I.T. 2004)

[SEAL]

U.S. Department of Justice
Civil Division

DMC:PMM:MSDufault
DJ: 54-2340

Phone: (202) 353-7961
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Washington, D.C. 20530
July 29, 2004

Jan Horbaly, Clerk
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

RE: United States v. Inn Foods, Fed. Cir. No. 04-1035

Dear Mr. Horbaly:

The Government submits this response to Inn Foods' citation of supplemental authority in accordance with Federal Rules of Appellate procedure 28(j) and Federal Circuit Rule 28(h). Inn Foods' reliance upon the United States Court of International Trade's decision in United States v. Leonard Guldman, Slip Op. 04-43, 2004 WL 909742 (CIT), to support its position that the Government's complaint was untimely filed by one day, is misplaced. The trial court's decision in Leonard Guldman supports the Government's position on appeal that [*sic*] anniversary method of computation should be applied to the waiver of limitation executed in this case.

In applying the anniversary method of computation announced in United States v. Neman Bros & Assocs, 777 F. Supp. 9062, 964 (C.I.T. 1991) to the waiver before it, the trial court in Guldman found that:

> The [trial] court has long analogized the computation of effective dates of statute of limitations waivers with the computation of the limitations periods themselves. Statutes of limitation are "construed to include the anniversary date of the accrual of the cause of action" under USCIT Rule 6(a) . . .

Guldman, 2004 WL 909742, at 3.

The trial court's decision in Guldman, thus, underscores the Government's arguments on appeal that the trial court's decision in this case was an anomaly in terms of its otherwise consistent adoption of the anniversary method of computation to waivers of the statute of limitations. While the trial court in Guldman attempted to distinguish the waiver before it from the waiver in Inn Foods, there is no meaningful textual distinction between the waiver in Inn Foods and the waiver at issue in Neman Bros. Accordingly, the supplemental authority cited to by Inn Foods ultimately serves to support the Government's position that the anniversary method of computation should be applied to the waiver in this case, and that the Government's complaint was timely filed.[7]

Respectfully submitted

S/Michael S. Dufault
Michael S. Dufault
Trial Attorney
Commercial Litigation Branch

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[7] Our response to Inn Foods' citation of supplemental authority was not filed sooner because counsel for Inn Foods elected to wait 17 days, after filing its citation with the Court on June 1, 2004, before it attempted to serve the Government, via United States mail on June 17, 2004. Att. At 1. Inn Foods' citation of supplemental authority was not received by the Department of Justice until June 29, 2004, and was not forwarded to the undersigned counsel until July 6, 2004. The undersigned counsel was on leave and travel from July 7 through July 25, 2004.

UNITED STATES V. INN FOODS, INC., 04-1035 (FED. CIR.), EXCERPTS FROM ORAL ARGUMENT, AUGUST 6, 2004

....

MR. DUFAULT (Government Counsel): .... The trial court below found that Inn Foods' waiver expired the day before its two-year anniversary date, and therefore the Government's complaint was filed one day late. Now, the trial court's decision should be overturned for three principal reasons. First, it retroactively altered the scope of the waiver's triggering language, which for years in the trial court had reflected a particular meaning, as interpreted by the trial court in United States v. Neman all the way through United States v. Guldman, which was recently issued in 2004. ....

....

THE COURT: If you have a year, or two years, or three years "commencing on" a particular date, when does that expire?

MR. DUFAULT: It would expire on the anniversary date, because the first date, the commencement date ...

THE COURT: Just on the language of the statement alone, "two years, commencing on" a date, when does it expire?

MR. DUFAULT : If you look at the language in a vacuum, it would expire two years after that date, counting – it would expire after that, and you would include the commencement date. But what we're urging to the Court, though, is that you can't look at that language in a vacuum. You have to look at its practical legal effect, and that practical legal effect has been interpreted by the trial court to mean that the commencement date isn't included, that the time starts to run the day after the commencement date, so therefore it would run through the anniversary date.

....

MR. DUFAULT: .... We also look at the trial court's own rules. Rule 6(a) of the trial court specifically states, in computing a period of time prescribed or allowed, the day of the act, event or default from which the designated period begins to run shall not be included. Now that's within the [trial] court's own rules. Now as the [trial] court stated, as Judge Restani stated in Guldman, the trial court has long analogized statutes of limitations with the waivers of those statutes of limitations. .... And there's also been, as Guldman noted, there's been a practice in the trial court for more than 15 years now. Judge Restani in Guldman specifically stated that Neman informed Customs' policies, and that's why Customs drafted the waivers the way they did ....

....

THE COURT: Why isn't this just a drafting rule? I mean, if you'd have said expiring on, or some language which really gave us a clear cut-off date, we wouldn't have this problem. Why isn't this just a drafting rule, and therefore we should follow the kind of basic rules and stick you with your language?

MR. DUFAULT: Well, again, you have to look at the context that we have this waiver in. And this waiver was drafted in the midst of a practice that's been acknowledged by the trial court for years now, that the commencement date isn't actually included, that the anniversary date – the anniversary method is the method that is actually employed. So this isn't a matter of just drafting, the drafting was done for a reason, it was done because the drafters knew that the language of this waiver conveyed a particular meaning – in this case was that it wouldn't commence until the next day. So, if you look at the context of when this waiver was drafted ....

THE COURT: Is it customary to have a practice based on a single trial court opinion?

MR. DUFAULT: Well, that's what's emanated from this. I don't know if it's customary to do that, but this

decision in Neman has been out there for a number of years now, and again, Guldman, when it came out ...

THE COURT: But it's a single trial court opinion based on language of that particular statute of limitations. I'm struggling a little bit to understand why that would give rise to a Government expectation or practice.

MR. DUFAULT: Well, I don't know if that happens in general but in this case that is what happened. And that has been recognized also by the [trial] court in Guldman that it's created a body of practice, in essence, that's emanated from this decision in Neman. ....

....

THE COURT: But if you had said in your waiver, "one year, counting the date of the execution of this waiver," then you'd lose this case, right?

MR. DUFAULT: That's correct.

THE COURT: So the only question in this case is whether "commencing" means "counting"?

MR. DUFAULT: Yes, that is the question in this case.

THE COURT: So it has nothing to do with the default rule?

MR. DUFAULT: But it's so closely related to the default rule, and because we're dealing with the same period of time, a statute of limitations and a waiver of that statute of limitations, if one is computed in one way, we're urging the Court to also compute the other in the same fashion. And again, as the trial court [unintelligible] Judge Restani in Guldman, the trial court has long analogized between statutes of limitations and waivers. So we're saying, consistent with that, the Court should apply the same rule to both. ....

UNITED STATES V. GULDMAN, 04-1434 (FED. CIR.), EXCERPT FROM ORAL ARGUMENT, FEBRUARY 9, 2005

....

THE COURT: How do you get around *Inn Foods*? *Inn Foods* says "commencing on," this case is "commencing with."

MR. BAYAR (Guldman counsel): Yes. Well, *Inn Foods* is wrong on that, and I will show why.

THE COURT: Well, if *Inn Foods* is wrong, you've got to make that argument to a different group. We are bound by *Inn Foods*.

MR. BAYAR: I understand that, but if we argue that it is wrong, which we have done, we can ask you to ask your colleagues –

THE COURT: Yes, you may do that, and the proper response would be for us to rule against you and then suggest that the Court may wish to reconsider our ruling.

MR. BAYAR: I understand that, and to that extent perhaps the result is preordained, but as long as I know that I'm not standing here with the decision having already been made, I'm prepared to go ahead.

THE COURT: Go ahead.

MR. BAYAR: If I can persuade you that *Inn Foods* is wrong, then perhaps I have a chance of persuading the entire body of the judges that they should hearing this case en banc in order to overrule *Inn Foods*.

THE COURT: Even if you don't persuade us, you understand you're entitled to petition for rehearing en banc after you get our decision –

MR. BAYAR: I understand that.

THE COURT: - and then there's a larger group than –

MR. BAYAR: I understand that you are constrained, but let me proceed, if I may.

THE COURT: Please.

....

United States Court of Appeals for the Federal Circuit

04-1434

UNITED STATES, Plaintiff-Appellee,
v.
LEONARD GULDMAN and L&M FIRING LINE, INC.,
Defendants-Appellants.

Appeal from the United States Court of International Trade in Case No. 1:03-CV-00047, Chief Judge Jane A. Restani.

Motion of Defendants-Appellants To Consolidate Appeals for Disposition

Pursuant to Fed R. App. P. 27, Defendants-Appellants Leonard Guldman and L&M Firing Line, Inc. (collectively, "L&M" or "We") hereby respectfully request the Court to consolidate this appeal ("Guldman") with United States v. Inn Foods, Inc., 04-1035, for purposes of disposition. We are filing our appellants' brief in Guldman contemporaneously with this motion. Inn Foods has been briefed and was argued on August 6, 2004.

Both appeals are taken from decisions on summary judgment by the U.S. Court of International Trade ("CIT") in civil penalty recovery actions commenced under 19 U.S.C. § 1592. Both decisions turn on whether waivers of the applicable statute of limitations (19 U.S.C. § 1621(1)) were in effect on the dates that the United States (the "Government") commenced the actions and, specifically, on whether the effective periods of the § 1621 waivers exclude their commencement dates. In both cases, the Government asserted that the § 1621 waivers exclude their commencement dates, regardless of their actual effective period language, in accordance with a practice or custom to apply the so-called "anniversary method" under

CIT R. 6(a) to all § 1621 waivers. The Government asserts that this practice was established by United States v. Neman Bros. & Assocs., 777 F. Supp. 962 (CIT 1991) and has been consistently followed since then by the CIT and relied upon by the U.S. Customs Service (now the Bureau of Customs and Border Protection) (hereinafter, the "Neman practice").

In Inn Foods, 264 F. Supp. 2d 1333, the CIT judge did not find a Neman practice, but looked to the unambiguous language of the two-year § 1621 waiver in question to hold that its effective period included its stated commencement date and therefore expired on its second anniversary date. On April 28, 2004, after Inn Foods had been briefed on appeal, a different CIT judge in Guldman found that the Neman practice exists and applied it to the § 1621 waiver in question because its effective period language is ambiguous. Slip Op. 04-43 (CIT, Apr. 28, 2004). On June 28, 2004, the CIT entered a final judgment in Guldman for the Government under CIT R. 68; we took a timely appeal, having expressly reserved our right to do so in our CIT R. 68 offer of judgment.

Both parties in Inn Foods cited the CIT's decision in Guldman as supplemental authority in support of their respective positions. In particular, the Government averred that Guldman supports its position on appeal that the Neman practice exists and has been consistently applied to § 1621 waivers. *See* annexed letter from Michael S. Dufault, Esq., to the Clerk of the Court, July 29, 2004. At the oral argument in Inn Foods (which the undersigned counsel attended), Mr. Dufault repeatedly argued to the panel that the CIT's decision in Inn Foods is an "anomaly" in light of its later decision in Guldman embracing the Neman practice; neither party mentioned, however, that Guldman has been appealed.

In our principal brief in Guldman, filed today, we explain in great detail why the CIT erred in finding that the Neman practice exists - much more detail, in fact, than either party provided to the Court in Inn Foods. It

remains to be seen whether the Government, in its upcoming principal brief, will be able to show that, notwithstanding our demonstration, the Court should uphold the CIT's decision in Guldman vis-à-vis the Neman practice – and therefore may confidently rely on that decision in Inn Foods.

Accordingly, it would greatly aid the Court's decision-making process to consider what the parties have to say about the Neman practice in Guldman before deciding in Inn Foods whether that practice exists. The Court may do so by consolidating the two appeals for disposition, as the Court has done in similar circumstances. *See, e.g.*, Zevalkink v. Brown, 102 F.3d 1236, 1243 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997) (two appeals consolidated for purposes of disposition); *cf. also* Hix v. Gober, 99-7094, -7102 (Fed. Cir., Sept. 20, 2000) (two appeals consolidated for briefing and argument).

Counsel for the Government in this appeal, David S. Silverbrand, Esq., has advised the undersigned counsel that the Government opposes this motion. The Government's litigation strategy here is obvious: Use Guldman (CIT) to win the Inn Foods appeal on the Neman practice issue, then use Inn Foods (Fed. Cir.) as *stare decisis* to win the Guldman appeal on the same issue. In this way, the merits of our arguments on the issue will not matter because they will never be considered. We hope that the Court will not countenance such bootstrapping.

Accordingly, for the reasons stated above, we respectfully request the Court to enter the attached proposed order, directing that the Inn Foods and Guldman appeals be consolidated for purposes of disposition.

August 23, 2004 /s/ Charles H. Bayar

Charles H. Bayar, Esq.
44 Lynwood Road, Scarsdale, NY 10583
(914) 722-2411
Attorney for Defendants-Appellants

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

04-1434

UNITED STATES, Plaintiff-Appellee,
v.
LEONARD GULDMAN and L&M FIRING LINE, INC.,
Defendants-Appellants.

ON MOTION

Before NEWMAN, Circuit Judge.

ORDER

Leonard Guldman et al. (Guldman) move to consolidate 04-1434 with United States v. Inn Foods, 04-1035. The United States opposes.

Guldman argues that this case and Inn Foods involve similar legal issues. The United States argues that consolidation is not appropriate because the cases are factually distinguishable and Inn Foods has already been argued, whereas briefing in this case is not yet completed. We agree that consolidation is not appropriate.

Accordingly, IT IS ORDERED THAT: The motion is denied.

OCT 20 2004
Date

/s/ Pauline Newman
Pauline Newman, Circuit Judge

cc: David S. Silverbrand, Esq.
Charles H. Bayar, Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
OCT 20 2004
JAN HORBALY, CLERK

United States Court of Appeals for the Federal Circuit

04-1434

UNITED STATES, Plaintiff-Appellee,
v.
LEONARD GULDMAN and L&M FIRING LINE, INC.,
Defendants-Appellants.

Appeal from the United States Court of International Trade in Case No. 1:03-CV-00047, Chief Judge Jane A. Restani.

MOTION FOR COURT REVIEW OF THE ORDER OF A SINGLE JUDGE

On October 20, 2004, Hon. Pauline Newman, Circuit Judge, issued an order (the "Order") denying the motion of Defendants-Appellants Leonard Guldman and L&M Firing Line, Inc. (collectively, "L&M" or "We"), to consolidate this appeal ("Guldman") with United States v. Inn Foods, Inc., 04-1035, for purposes of disposition. Pursuant to Fed R. App. P. 27(c) and Fed. Cir. R. 27(l), we respectfully request the Court to review the Order and consolidate the appeals for purposes of further proceedings. Government counsel has advised the undersigned counsel for L&M that the Government neither opposes nor consents to consolidation at this time, and reserves its right to respond.

Both Guldman and Inn Foods are appeals taken from decisions on summary judgment by the U.S. Court of International Trade ("CIT") in civil penalty recovery actions commenced under 19 U.S.C. § 1592. Both decisions turn on whether waivers of the applicable statute of limitations (19 U.S.C. § 1621) were in effect on the dates that the United States (the "Government") commenced the actions and, specifically, whether the

effective periods of the § 1621 waivers exclude their commencement dates under the "anniversary method" reflected in CIT R. 6(a) ("Rule 6(a)"). In our motion, we argued that Guldman and Inn Foods should be consolidated for disposition because they present a central common issues of law, *viz.*, whether Rule 6(a) applies to the time period provisions of the § 1621 waivers.

We filed our consolidation motion on August 23, 2004, the same day on which we filed our appellants' brief. The Government's appellee's brief and our reply brief had yet to be filed; Inn Foods, on the other hand, had been briefed and argued. We noted in our motion that, at oral argument in Inn Foods, the Government relied heavily on Guldman's holding that Rule 6(a) applies to L&M's waiver in support of its argument that it also applied to Inn Foods' waiver. We asserted that the Government was thus trying to use the CIT's decision in Guldman to prevail on the Rule 6(a) issue in Inn Foods, then rely on this Court's decision in Inn Foods as *stare decisis* to prevail on the Rule 6(a) issue in the Guldman appeal. We expressed the "hope that the Court will not countenance such bootstrapping."

On September 12, 2004, the Government filed an opposition to our consolidation motion. The Government asserted that Guldman and Inn Foods are "factually distinguishable," and also were at "largely different stages of the appellate process," so "it would not be in the interest of the most efficient use of judicial resources" to consolidate the cases. The Government "strongly disagreed" with our assertions about the Government's appellate litigation strategy. Lastly, the Government averred that Inn Foods "may well control the disposition of this case, [but] it may not," so our consolidation motion "is inherently speculative." In denying consolidation, Judge Newman agreed with the Government's arguments.

We seek review and reconsideration because events since the Government advanced these arguments have

clarified the interconnection between Inn Foods and Guldman, altered the judicial efficiency dynamic, confirmed our perception of the Government's bootstrapping strategy – in short, and in every respect, our "speculations" are now fact. Judge Newman's decision may be defensible based on the circumstances of September 12, 2004, but the circumstances now make consolidating Guldman and Inn Foods for further proceedings appropriate, efficient, and fair.

On September 13, 2004 – the day after the Government responded to our motion -- a panel of this Court (including Judge Newman) decided Inn Foods in favor of the Government, based on these holdings:

> (a) Rule 6(a) applies to the time period language of a § 1621 waiver, relying directly on the CIT's decision in Guldman, as the Government had urged at oral argument -- and as we had predicted in our consolidation motion;
>
> (b) Being governed by Rule 6(a), a § 1621 waiver will be construed to adopt the anniversary method of time period computation unless it explicitly specifies the first day on which the waiver period is to be counted; and
>
> (c) Inn Foods' waiver, which provides that the waiver period "commenc[es] on December 14, 1999," specifies only the waiver's starting date and not the first day to be counted, so Rule 6(a) and the anniversary method apply.

Holdings (a) and (b) apply to Guldman directly; Holding (c) also applies to Guldman, even though L&M's waiver says "commencing with." Judge Newman did not mention in her motion decision that Inn Foods had been decided

On October 4, 2004, the Government filed its principal brief in Guldman. As we had predicted, having prevailed upon the Inn Foods panel to use Guldman below as a basis for its decision, the Government now cited Inn Foods on appeal as *stare decisis* on the statute of limitations waiver issue in Guldman on appeal.

On October 25, 2004, we filed our reply brief in Guldman, with 23 of 25 pages devoted to Inn Foods. We demonstrated that Inn Foods: (a) misconstrues both Inn Foods' waiver and Rule 6(a) by overlooking the substantive significance of the prepositions "on" and "from," respectively; (b) misapplies Rule 6(a) as the governing rule of construction for non-statutory, contractual statute of limitations waivers, thus ignoring Rule 6(a)'s explicitly limited applicability to court rules, court orders, and applicable statutes; and (c) erroneously requires a § 1621 waiver to explicitly specify the calendar method of computation or the first day of the waiver period to be counted in order to avoid Rule 6(a), when the Rule itself and applicable case law require only a clear indication or implication that the waiver's starting date is included in the waiver period. On the basis of these arguments – none of which were briefed or argued to the Inn Foods panel – we requested that the panel assigned to Guldman ask the Court, pursuant to Fed. Cir. R. 35(a)(2), to hear the appeal *en banc* in order to overrule Inn Foods as wrongly decided.

We would have been content to argue Guldman to whatever panel of the Court draws the assignment, but for the fact that, on October 28, 2004, Inn Foods petitioned for panel rehearing of Inn Foods. Thus, there are now two matters -- a fully briefed appeal, and a petition for rehearing – pending before two different panels of the Court, both seeking to have Inn Foods overturned. While technically the Inn Foods panel could deny rehearing while the Guldman panel grants our Rule 35(a)(2) request, there is no small degree of inefficiency in having two panels of the Court, at the same time, consider different arguments directed at the same decision and perhaps reach inconsistent results. Furthermore, if the Guldman panel grants our Rule 35(a)(2) request, then the Court en banc will be polled and perhaps will have to hear and decide Guldman.

We believe it would make the best use of judicial resources and facilitate the Court's reaching a fully considered decision on the issues (which Inn Foods is not), if the Inn Foods rehearing petition were held in abeyance while this appeal is argued before and decided by the same panel that decided Inn Foods. Such consolidation of a rehearing petition and pending appeal is not unprecedented,[1] and in these circumstances makes eminent sense. First of all, the Inn Foods panel has only recently dealt with § 1621 waivers, Rule 6(a), *etc.*, so there would be no need for a different panel to familiarize itself with this matters. Furthermore, there is no panel better able to evaluate the briefs and arguments in Guldman vis-à-vis Inn Foods than the panel that decided Inn Foods – and they especially will ***know*** that they never considered those arguments and authorities in doing so. There is also a strong element of fairness here: the Inn Foods panel did, after all, rely on Guldman as supporting authority for its decision despite the fact that this appeal is pending, and it is now only fair that the same panel hear our reasons why its reliance was misplaced. Finally, if the Inn Foods panel decides that our arguments here have merit, then the panel can vacate Inn Foods (which would not be a final decision on account of the petition for panel rehearing) and decide both appeals correctly, with no need for the Court's *en banc* involvement.

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[1] We find mention of several instances where a federal appeals court consolidated a case in rehearing with another pending appeal. Florida Power & Light Co. v. International Brotherhood of Elec. Workers, 417 U.S. 790, 797 (1974) (court of appeals consolidated petition for rehearing in one appeal with second appeal raising the same question of law); Rhode Island Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 39 (1st Cir. 2002) (motion for rehearing consolidated with pending appeal).

Accordingly, for the reasons stated above, we respectfully request the Court to enter the attached proposed order, directing that the Inn Foods and Guldman appeals be consolidated for purposes of further proceedings.

November 1, 2004 /s/ Charles H. Bayar

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Attorney for Defendants-Appellants

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

04-1434

UNITED STATES, Plaintiff-Appellee,
v.
LEONARD GULDMAN and L&M FIRING LINE, INC.,
Defendants-Appellants.

ON MOTION

Before NEWMAN, RADER, and BRYSON, Circuit Judges

ORDER

Leonard Guldman and L&M Firing Line, Inc., move for three-judge review and reconsideration of this court's October 20, 2004 order denying their motion to consolidate this appeal with United States v. Inn Foods, 04-1035. The United States responds. Guldman replies.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The motion for three-judge review is granted.

(2) The motion for reconsideration is denied.

NOV 19 2004
Date

/s/ Pauline Newman
Pauline Newman, Circuit Judge

cc: David S. Silverbrand, Esq.
Charles H. Bayar, Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
NOV 19 2004
JAN HORBALY, CLERK

United States Court of Appeals for the Federal Circuit

04-1035

UNITED STATES, Plaintiff-Appellant,
v.
INN FOODS, INC., Defendant-Appellee.

Appeal from the United States Court of International Trade in Case No. 01-01106, Senior Judge Nicholas Tsoucalas.

Motion of L&M Firing Line, Inc., for Leave To File Brief of *Amicus Curiae* in Support of Defendant-Appellee Inn Foods, Inc., Supporting Affirmance

Pursuant to Fed R. App. P. 29(a), L&M Firing Line, Inc. ("L&M") hereby respectfully requests leave of the Court to file the accompanying proposed brief of *amicus curiae* in support of Defendant-Appellee Inn Foods, Inc. ("Inn Foods"), supporting affirmance. Counsel for Inn Foods has advised L&M counsel that Inn Foods consents to this motion. *See* Affidavit of Charles H. Bayar, Esq., counsel for L&M ("Bayar Aff't") ¶ 10 (attached). Counsel for Plaintiff-Appellant the United States (the "Government') has advised L&M counsel that the Government opposes this motion. Bayar Aff't ¶¶ 7-8 .

L&M, a Colorado corporation located at 20 South Potomac, Aurora, CO 80012, is an importer, dealer and distributor of firearms. On February 5, 2003, the Government initiated a civil action in the U.S. Court of International Trade (the "CIT") against L&M and its president and owner, Leonard Guldman, United States v. Guldman, Ct. No. 03-00047 (the " '047 Case"),[2] to recover a civil penalty from L&M for an alleged violation of

[2] Hereinafter, "L&M" refers to L&M and Mr. Guldman collectively.

19 U.S.C. § 1592. As of February 5, 2003, the Government's claims were barred by the statute of limitations, 19 U.S.C. § 1621. On February 5, 2002, however, L&M had executed a waiver of the § 1621 statute of limitations (hereinafter, a "§ 1621 waiver") "for a period of one (1) year, **commencing with** the date of execution" (emphasis added). Bayar Aff't ¶¶ 1-2.

In its answer to the Government's complaint, L&M affirmatively pled that the case is time-barred under § 1621, and further asserted that it is not constrained from asserting this defense by its § 1621 waiver. On December 3, 2003, L&M moved for summary judgment in the '047 Case based mainly on this defense. In its accompanying brief, L&M relied upon the language of its § 1621 waiver in light of United States v. Inn Foods, Inc., 264 F. Supp. 2d 1333, *rehearing denied*, 276 F. Supp. 2d 1359 (CIT 2003) – the decision on appeal herein. L&M also discussed United States v. Neman Bros. & Assoc., 777 F. Supp. 962 (CIT 1991), which Inn Foods did not follow. In its February 12, 2004, memorandum of law addressing L&M's motion, the Government made many of the assertions found in its appellant's brief herein, filed January 21, 2004 ("Gov't Br."), advised the CIT that this appeal is pending, and promised that its disagreement with Inn Foods and adherence to Neman Bros. "will be resolved on appeal." Bayar Aff't ¶¶ 3-4.

L&M's reply brief of March 3, 2004, addressed the Government's assertions in great detail. Bayar Aff't ¶ 5. Whether the CIT agrees with L&M or the Government on these issues, however, may be a moot point. This Court's decision in this appeal will address some or all of their common issues, and its decision as to issues of law will bind the CIT in the '047 Case.[3] Thus, L&M has a strong

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[3] Counsel for the parties herein advise the Court that they are unaware of any case pending in any other court that will be directly affected by the Court's decision in this appeal. Gov't Br. at *iv*; Inn Foods Br. at *vi*. These statements are incorrect; indeed, the Government has advised the CIT otherwise. Bayar Aff't ¶ 4.

and legitimate interest in this Court's reaching a fully-considered decision in this appeal. If the effective period of a § 1621 waiver turns on issues of law, then the Court herein is deciding not just Inn Foods' case, but L&M's as well.[4]

Participation as an *amicus* "is a privilege within 'the sound discretion of the courts.'" United States v. Michigan, 940 F.2d 143, 165 (6th Cir. 1991), *quoting* Northern Sec. Co., v. United States 191 U.S. 555 (1903). In addition to showing that it has a specific interest in this appeal, L&M must show that its proposed brief of *amicus curiae* is "desirable." Fed. R. App. P. 29(b)(2). This term is undefined, and no case we have found provides a succinct definition. We therefore address what appear to be two sets of criteria for *amicus* participation: those that look to the nature of the proposed *amicus* itself, and those that look to the nature of its proposed brief.

The often-quoted criteria that look to the nature of a proposed *amicus* are stated in Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted, emphasis added):

> An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, **when the *amicus* has an interest in some other case that may be affected by the decision in the present case** ... or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an *amicus curiae* brief should be denied.

The Government opposes L&M's participation as an amicus in this appeal on two grounds: (a) "it doesn't appear that Inn Foods is incapable of making their arguments without [L&M's] assistance"; and (b) as a

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[4] *Compare* Abu-Jamal v. Horn, 2000 U.S. Dist. LEXIS 11013, 16-17 (E.D. Pa. 2000) ("Nor do *amici* allege any potential prejudicial impact on other litigation as a result of any decision this court may make").

commercial company rather than a trade association, public interest group, labor union, or other non-governmental organization, L&M cannot provide any perspective on the issues here that Inn Foods cannot provide. *See* Bayar Aff't ¶ 8. The Government's objections spring from the unemphasized Ryan criteria; L&M, however, clearly satisfies the **emphasized** criterion vis-à-vis this appeal. *See* pp. 2-3 above.[5] Significantly, the Ryan criteria are stated in the disjunctive, indicating that a proposed *amicus* who satisfies any one of them should be permitted to participate.

This is not say that we concede the validity of the Government's advance objections to our participation as an *amicus curiae* in this appeal; on the contrary, we dispute them. If the Government's point (a) were valid, then an *amicus* could readily appear to support a party appearing *pro se*. Otherwise, a prospective *amicus* must disparage the attorney for the party it seeks to support; perversely, that party can consent to the *amicus*' participation only by conceding that its own lawyer is incompetent -- indeed, that very lawyer must admit it! The suggestion is unsupportable; *see* Neonatology Assocs.,

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[5] The Government might argue that L&M's rights and interests can be fully vindicated in its own '047 Case, citing Cobell v. Norton, 276 F. Supp. 2d 59 (D. D.C. 2003). Cobell, is distinguishable, however. In that case, a district court denied leave for an Indian tribe to file an *amicus* brief in a tribal rights case brought by another tribe, in part because the proffering tribe's interests "are already fully represented because it has filed an independent civil action against defendants." The proffering tribe's action, however, was also pending in district court, *i.e.*, at the **same** judicial level at which it sought leave to appear as an *amicus*. Here, Inn Foods is being briefed on appeal in this Court while L&M's '049 Case has been briefed in the CIT. This Court's appellate decision in Inn Foods on legal issues will dictate the CIT's decision on those issues in the '047 Case. If Inn Foods is wrongly decided on appeal, it can be remedied only by an *en banc* decision of this Court, which rarely issues. In these circumstances, unfortunately, L&M's interests are inadequately represented even in its own case.

P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002):

> [R]equiring a prospective *amicus* to undertake the distasteful task of showing that the attorney for the party that the *amicus* wishes to support is incompetent is likely to discourage *amici* in instances in which the party's brief is less than ideal and an *amicus* submission would be valuable to the court").

If the Government's point (b) were valid, then commercial companies would rarely, if ever, be permitted to participate as *amici* – yet commercial companies have regularly appeared as *amici* in this Court. Just within the past two weeks, for example, this Court has issued two decisions which note the *amicus* participation of commercial enterprises. Bankcorps Services, L.L.C. v. Hartford Life Assurance Co., 03-1181 (Fed. Cir., Mar. 1, 2004) (*amici curiae* Metropolitan Life Insurance Co. and Sun Life Assurance Co, of Canada (US)); Pfizer, Inc. v. Dr. Reddy's Laboratories, Ltd., 03-1227, -1259 (Fed. Cir., Feb. 27, 2004) (briefs of *amici curiae* submitted by brand-name pharmaceutical companies Eli Lilly, Merck, and Wyeth).[6] (The latter case also cuts against the Government's point (a) above: The *amici's* briefs addressed the meaning and purpose of the statute involved in the appeal (*id.*, Slip Op. at 6.n.2) – an issue which Pfizer, the party they supported, was quite capable of addressing).

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[6] In 2003, this Court permitted commercial companies to participate as *amici* in the following published cases: Ridge Line, Inc. v. United States, 346 F.3d 1346 (Fed. Cir. 2003); Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 344 F.3d 1336, 1337 (Fed. Cir. 2003) (appeal taken for *en banc* consideration; *amicus curiae* briefs on legal issues welcomed); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 344 F.3d 1359 (Fed. Cir. 2003) (*en banc*)(15 *amicus curiae* briefs received); George E. Warren Corp. v. United States, 341 F.3d 1348 (Fed. Cir. 2003); Allergan, Inc. v. Alcon Labs., 324 F.3d 1322 (Fed. Cir.), *cert. denied*, 2003 U.S. LEXIS 8602 (2003).

Alternative criteria looking to the nature of the proposed *amicus* brief were enunciated recently by a trial court, as follows:

> Commonly, *amicus* status is granted only when there is an issue of general public interest, the *amicus* provides supplemental assistance to existing counsel, or the *amicus* insures a "complete and plenary presentation of difficult issues so that the court may reach a proper decision."

Alliance of Auto. Mfrs. v. Gwadowsky, 2003 U.S. Dist. LEXIS 23003, at *4 (D. Me 2003), quoting Alexander v. Hall, 64 F.R.D. 152, 155 (D. S.C. 1974); *see also* 20A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 329.11 (3d ed. 2002) ("The classic role of an *amicus curiae* is to assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration").

We must admit that the method of computing the effective period of a § 1621 waiver is not an issue of general public interest. We are confident, however, that the Court will agree that our *amicus* brief provides substantial supplemental assistance to Inn Foods, and thereby assists the Court by contributing to a complete airing of the legal issues that we address. Those issues – seven in all – are raised both in Gov't Br. and in the Government's response to our motion for summary judgment in the '047 Case. *See* Bayar Aff't ¶ 4. In preparing our reply brief in that case, we developed important insights into the merits of these issues, which we believe may assist this Court in its deliberations in this appeal. Indeed, since the CIT already has the benefit of these insights in the '047 Case, we see no reason why they should be withheld from this Court.

In particular, our proposed *amicus* brief presents extensive case law on the general issues of the treatment of unambiguous contract terms, the retroactive applicability of court decisions, and the relationship between contracts and existing law, that otherwise would

not be presented to the Court by either party in this appeal. That is a perfectly proper and helpful contribution by an *amicus* brief. *See* Fed. R. App. P. 29, Notes of Advisory Committee on 1998 Amendments, *quoting* Sup. Ct. R. 37.1 ("An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court").

In this regard, the fact that our proposed *amicus* brief supports Inn Foods' position in this appeal is no bar to its acceptance. *See generally* In re Meinen, 228 B.R. 368, 376 (W.D. Pa. 1998) & cases cited. Indeed, Fed. R. App. P. 29(c) **requires** an *amicus* brief to support one side of an appeal or the other, and to take a position for affirmance or reversal.

> [T]he fundamental assumption of our adversary system [is] that strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.

Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128, 131 (3d Cir. 2002). Our proposed *amicus* brief does just that.

Finally, we address certain specific characteristics that the authorities suggest an *amicus* brief should have – and should not have.

"An amicus brief is supplemental .... It should treat only matter not adequately addressed by a party." Fed. R. App. P. 29(d), Advisory Committee Notes to 1998 Amendment. All of the arguments in our *amicus* brief concern legal issues that Inn Foods either addressed only briefly, or did not address at all; there is no substantial duplication or repetition. The most important illustration of this characteristic involves Neman Bros., the 1991 CIT decision on which the Government relies heavily. Inn Foods argues that the CIT properly did not defer to Neman Bros. as *stare decisis* (Inn Foods Br. at 7-8);

properly, our brief does not echo this argument. Inn Foods, however, did not analyze the substance of Neman Bros. in any great depth.[7] Our proposed *amicus* brief supplies this omission, affirmatively showing that Neman Bros. is nonprecedential by its own terms and wrongly decided – and even if rightly decided, distinguishable from Inn Foods' case based on the language of the § 1621 waivers in issue. Our brief also addresses United States v. Ressler, 576 F.2d 650 (5th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979) -- the one case cited in Neman Bros. as the basis to apply CIT R. 6(a) to a § 1621 waiver, which is discussed in Gov't Br. at 16 but not in Inn Foods Br.

The proper role of an *amicus* is "to aid the Court in resolving doubtful issues of law rather than [to] present a partisan view of the facts." 20A JAMES WM. MOORE *et al.*, MOORE'S FEDERAL PRACTICE ¶329.12 n.7 (3d ed. 2001). *See also* Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970) ("[A]n *amicus* who argues facts should rarely be welcomed"). Our proposed *amicus* brief does not go anywhere near disputed issues of fact, or even issues of law that are intertwined with them. Specifically, the Government asserts that: (a) the CIT in Inn Foods erred in ignoring Inn Foods' "explicit, written intent" that its § 1621 waiver was valid through December 14, 2001 (Gov't Br. at 18-20); and (b) Inn Foods should be equitably estopped from asserting its statute of limitations defense because its explicit, written intent induced Customs to believe that its § 1621 waiver was valid through December 14, 2001 (Gov't Br. 21-23). Even though the Government has raised similar assertions against us in

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[7] Inn Foods avers that Neman Bros. is "not ... dispositive or persuasive" because: (a) Neman Brothers "apparently did not brief the waiver issue," and (b) Neman Bros. relies on "a string of non-binding, out of circuit citations which found the anniversary method of computation applicable to ... limitation periods whose terms were dictated by statute," while its § 1621 waiver is non-statutory and "explicitly designates the day on which [its] waiver agreement would begin to toll." Inn Foods. Br. at 8-9.

the '047 Case, our proposed *amicus* brief does not touch upon these fact-related issues.

Our proposed *amicus* brief also refrains from raising new issues that neither the Government nor Inn Foods have raised in their briefs. *See* Russian River Watershed Prot. Comm. v. City of Santa Rosa, 142 F.3d 1136, 1141 & n.1 (9th Cir. 1998) ("Generally, we will not consider on appeal an issue raised only by an *amicus*"). In particular, the Government's raised two of its three principal issues before the CIT only in its petition for reconsideration, and did not raise at least two sub-issues within its third principal issue before the CIT at all. Inn Foods, however, did not assert that these issues are improperly raised for the first time on appeal (Bayar Aff't ¶ 10), and we properly do not raise this issue as *amicus curiae*.

Finally, an *amicus* brief should not be a stalking-horse, *i.e.*, a disguised or extended brief for a party. Our proposed amicus brief is not of that nature. Inn Foods and L&M did not coordinate to any degree in the preparation of their respective briefs. Bayar Aff't ¶ 9. Moreover, the combined briefs of Inn Foods and L&M total approximately 7,000 words, which is about one-half of Inn Foods' permitted type-volume limitation under Fed. R. App. P. 32(a)(7)(B).

Accordingly, for the reasons stated above, L&M respectfully requests the Court to enter the attached proposed order, directing that the Brief for *Amicus Curiae* L&M Firing Line, Inc., in Support of Defendant-Appellee Inn Foods, Inc., Supporting Affirmance be accepted for filing.

March 9, 2004

/s/ Charles H. Bayar

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Scarsdale, NY 10583
(914) 722-2411
Attorney for proposed *Amicus Curiae* L&M Firing Line, Inc.

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

04-1035

UNITED STATES, Plaintiff-Appellant,
v.
INN FOODS, INC., Defendant-Appellee.

ON MOTION

Before SCHALL, Circuit Judge.

ORDER

L&M Firing Line, Inc., moves for leave to file a brief amicus curiae. L&M states that Inn Foods consents. The United States opposes. L&M replies.

Upon consideration thereof, IT IS ORDERED THAT: The motion is denied.

APR 19 2004
Date

/s/ Alvin A. Schall
Alvin A. Schall, Circuit Judge

cc: Michael S. Dufault, Esq.
Robert Scott Whitely, Esq.
Charles H. Bayar, Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
APR 19 2004
JAN HORBALY, CLERK

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

04-1035

UNITED STATES, Plaintiff-Appellant,
v.
INN FOODS, INC., Defendant-Appellee.

ON MOTION

Before SCHALL, GAJARSA, and PROST, Circuit Judges.

ORDER

L&M Firing Line, Inc., moves for three-judge review and reconsideration of this court's order denying its motion for leave to file a brief amicus curiae.

Upon consideration thereof, IT IS ORDERED THAT:

(1) The motion for three-judge review is granted.

(2) The motion for reconsideration is denied.

FOR THE COURT

JUN 15 2004
Date

/s/ Alvin A. Schall
Alvin A. Schall, Circuit Judge

cc: Michael S. Dufault, Esq.
Robert Scott Whitely, Esq.
Charles H. Bayar, Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
JUN 15 2004
JAN HORBALY, CLERK